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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF
UNITED STATES

October Term, 1988

RONALD J. PERHOLTZ,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A
WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Steven Schaars*/
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Suite 500
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- and -

QUESTION PRESENTED

Whether in the wake of the decision in McNally v. United States, 107 S. Ct. 2875 (1987), petitioner's conduct for which he was prosecuted was encompassed by 18 U.S.C. § 1341?

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OPINION BELOW

The United States Court of Appeals for the District of Columbia Circuit affirmed petitioner's conviction and

sentence in an opinion issued March 8, 1988, United States v. Ronald J. Perholtz, No. 88-3032 (D.C. Cir. March 8, 1988)[1]

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on March 8, 1988. Accordingly, this petition for a writ of certiorari is timely. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The following statutes are involved in this petition:

1. Section 1341 of Title 18 of the United States Code provides:

   Fraud and swindles

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[1] The other parties to the proceeding where Franklin W. Jackson and Gregory W. Fletcher.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at

the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

2. Section 1961(5) of Title 18 of the United States Code provides:

Definitions

As used in this chapter-

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

3. Section 1962(c) of Title 18 of the United States Code provides:

(c) It shall be unlawful for any person employed by or associated with any

enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the coundcut of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

STATEMENT OF THE CASE

This case arises out of the criminal prosecution of Ronald J. Perholtz and three others, of whom one was acquitted, for various actions which were characterized as mail fraud and brought under the umbrella of racketeering. Because the case was indicted and tried prior to this Court's decision in McNally v. United States, 107 S. Ct. 2875 (1987), both the monetary loss and pure fiduciary loss issues were presented to the jury.

Ronald J. Perholtz was convicted for a single substantative offense under the

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 (c), for 13 counts of mail fraud under the Mail Fraud Statute, 18 U.S.C. § 1341, and for the forfeiture declared as to certain assets pursuant to 18 U.S.C. § 1963. The predicate acts for the racketeering conviction arose from two different schemes set forth in Counts 3 through 5 of the indictment and Counts 6 through 15 of the indictment.

Each of the schemes was charged, tried, argued and instructed on the principal theory that the citizens of this country have an intangible right to good government and that that right was violated by the conduct of petitioner Perholtz and others as they engaged in the two schemes set forth in Counts 3 through 15 of the indictment. The principal theory did not focus upon the deprivation of benefits that had monetary

aspects whether in a sum that had been liquidated or not. Carpenter v. United States, 108 S. Ct. 316, 321 (1987).

As the government conceded prior to this Court's decision in McNally, Counts 3 through 5 of the indictment set forth mail fraud allegations which "charged, Perholtz and Jackson were engaged in a mail fraud scheme, starting in 1977, to defraud the United States Postal Service ('USPS') of an honest procurement process by means of bribery and fraud and violation of 18 U.S.C. §§ 1341 & 2." (Government's opening brief in the United States Court of Appeals for the District of Columbia Circuit at 1, emphasis supplied.)

It similarly conceded that the mail fraud counts set forth in Counts 6 through 15 of the indictment "charged Perholtz, Jackson, Fletcher and Root with engaging in a mail fraud scheme to

defraud the Small Business Administration ('SBA') of an honest procurement process on another multi-million dollar contract by means of a receipt of kickbacks, fraud, and breaches of fiduciary and contractual duties, in violation of 18 U.S.C. §§ 1341 & 2. (Id. at 2, emphasis supplied.)

Subsequent to the briefing and argument of the case before the United States Court of Appeals, but prior to decision, this Court decided McNally.

Thereafter, petitioner sought leave to file supplemental briefs in light of the opinion in McNally.

Such briefs were filed and on March 8, 1988, the Court of Appeals determined that the dictates of McNally had not been breached.

REASON FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the District of Columbia Circuit[2], conflicts with this Court's decisions in McNally and in Carpenter v. United States. It also conflicts directly with several post McNally decisions of other courts of appeals. Furthermore, the lower courts have reached inconsistent results in deciding the applicability of McNally. Review by this Court is warranted to resolve this split among the circuits and to provide guidance to the lower courts in an area which has proven especially susceptible to inconsistent, divergent, and unreasonable results.

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[2] The Court of Appeals issued an opinion on appellants' motions for release pending appeal in United States v. Perholtz, 836 F.2d 556, 558-60 (D.C. Cir. 1988) which in part relates to its view of the McNally issue raised by this petition.

This Court's decision in McNally has been characterized as "block busting", United States v. Piccolo, 835 F.2d 517, 521 (3d Cir. 1987) (Aldisert, J., dissenting); a "total surprise", United States v. Slay, 673 F. Supp 336, 343 (E.D. Mo. 1987); and "wholly unexpected". United States v. Doherty, 675 F. Supp. 726, 728 (D. Mass. 1987).

The reactions of the Courts of Appeals to McNally have varied. Those which have reversed based upon polluted jury charges include: United States v. Gordon, 836 F.2d 1312 (11th Cir. 1988); United States v. Covino, 837 F.2d 65 (2d Cir. 1988); United States v. Murphy, 836 F.2d 248 (6th Cir. 1988); United States v. Gimbel, 830 F.2d 621 (7th Cir. 1987); and United States v. Herron, 825 F.2d 50 (5th Cir. 1987). Those which have affirmed convictions despite McNally. include: United States v. Piccolo, 835

F.2d 517 (3d Cir. 1987); United States v. Richerson, 833 F.2d 1147 (5th Cir. 1987); United States v. Runnels, 833 F.2d 1183 (6th Cir. 1987); United States v. Wellman, 830 F.2d 1453 (7th Cir. 1987); United States v. Fagan, 821 F.2d 1002 (5th Cir. 1987), cert. denied, 56 U.S.L. W. 3459 (1988).

These cases illustrate the frequency and variety of challenges to the use of the mail fraud statute and the struggle in which the courts have engaged to realign the results of criminal cases to the "blockbuster" decision in McNally.

In the instant case, the trial court did not have the benefit of McNally and the Court of Appeals misconstrued it. The result is that this case and others have created confusion in an area which is repeatedly being litigated. In the context of this case, the Court has the further opportunity to signal clearly the

result dictated by McNally and to end the confusion and disparate results of lower court application of McNally.

In the trial of this case, the jury was principally offered evidence that petitioner Perholtz and others worked to deprive the government of the good faith efforts of its employees and agents. The Government never attempted to prove that a financial loss had resulted to it as a result of the conduct charged and proven at the trial. As a result, the jury in this case was offered evidence, heard argument and was instructed as to the loss of intangible rights without monetary loss by the Government. The jury also was instructed as to a monetary deprivation. Unquestionably, the trial court's instructions presented two theories to the jury.

Under McNally all that must be shown by petitioner Perholtz is that the

prosecution's principal theory of the case was that his participation in the charged self dealing procurement scheme defrauded the citizens and the Government of the United States of certain "intangible rights," such as the right to have the Government's affairs conducted honestly. In that event, the conviction simply cannot withstand scrutiny.[3]

Because this case was submitted to the jury on two theories, one of them

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[3] Petitioner Perholtz seeks permission of this Court to adopt the Questions for Review, Reasons for Allowing the Writ and Appendix of petitioner Franklin W. Jackson. Mr. Jackson was tried as a co-defendant of Mr. Perholtz, his appeal was heard as a consolidated case with Mr. Perholtz and, we submit, the issues before this Court as it considers this petition are identical to those presented on behalf of Petitioner Jackson. To avoid the filing of duplicative arguments and documents and for further reasons, petitioner Perholtz, respectfully requests that this Court allow him to adopt the appendix and positions put forth on behalf of petitoner Franklin W. Jackson. Counsel for Mr. Jackson have advised us that they have no objection to this request.

including the impermissible intangible or fiduciary rights theory, the writ should be granted. The Government must show that both theories presented to the jury are legally sufficient. "[A] general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds and one of those grounds is insufficient because the verdict may have rested exclusively on the insufficient ground." Zant v. Stephens, 462 U.S. 862, 881 (1983); See Yates v. United States, 354 U.S. 298, 311-12 (1957); Stromberg v. California, 283 U.S. 359, 367-68 (1931). When one of the Government's legal theories suffers from a legal flaw and fails to state an offense, the verdict simply cannot stand.

In light of McNally the verdict in this case is ambiguous because the jury could have rejected the monetary loss

theory and convicted only on the intangible or fiduciary rights theory. The presence of a monetary issue in the record does not warrant a result different than that urged here. The entire thrust of the government case was good government. Nothing in the jury charge on mail fraud required a finding of monetary loss. See, McNally, 107 S. Ct. at 2882; see also Runnels, 833 F.2d at 1194-95 (Guy, J., dissenting) (arguing that affirming on a legal theory not raised at trial is erroneous). Faced with an ambiguous verdict of the type at issue here, the appropriate course is to reverse each of the mail fraud convictions.

This case and those arising in other Circuit Courts of Appeals illustrate the frequency with which the federal courts are faced with questions concerning the proper construction of the mail fraud

statute in light of McNally. They also indicate the need for this Court to eliminate any ambiguity arising from McNally as to the applicability of 18 U.S.C. 1341 to conduct which is presented to a jury on both tangible and intangible rights theories. There is the potential for the expenditure of significant government resources in such cases and the causation of irrevocable harm to individuals without such clarification. Since this case presents an issue that is frequently litigated, and the Courts of Appeals are in conflict, review is warranted here to decide the unresolved issues springing from mail fraud prosecutions.

In the event that this Court determines that the mail fraud convictions under only one of the schemes Counts 3 through 5 or Counts 6 through 15, merit reversal, the racketeering

conviction of petitioner Perholtz should be reversed because of the failure of the Government to establish the required pattern of racketeering activity.[4] A single fraudulent scheme has been held to be insufficient to establish the predicate acts necessary for a racketeering conviction. See e.g. Lipin Enterprises v. Lee, 803 F. 2nd 322 (7th Cir. 1986) (12 predicate acts deemed insufficient to create a pattern since all alleged acts pertained to a single transaction with a single victim). See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n. 14 (1985); United States v. Joseph, 781 F.2d 549 554 (6th Cir. 1986) (if conviction for even one predicate offense underlying a substantive

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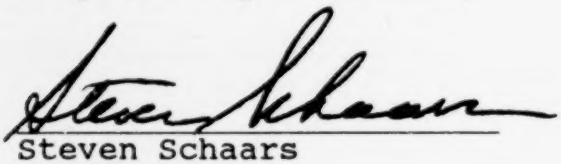
[4] Clearly a holding that all mail fraud counts are tainted will ultimately require reversal of the racketeering conviction because of the absence of sufficient predicate acts.

racketeering count is vacated, the substantive racketeering court must be vacated).

CONCLUSION

For all of foregoing reasons, and those submitted on behalf of Petitioner Franklin W. Jackson, Certiorari should be granted.

Respectfully submitted,



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CERTIFICATE

I, Steven Schaars, a member of the Bar of this Court, hereby certify that on this 9th day of May, 1988, three copies of the Petition for A Writ Of Certiorari to the Supreme Court of the United States in the above-captioned case were mailed, first-class postage prepaid to each of the following:

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I further certify that all parties required to be served have been served.

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Dated: May 9, 1988

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APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-3032

UNITED STATES OF AMERICA

v.

RONALD J. PERHOLTZ, APPELLANT

No. 86-3033

UNITED STATES OF AMERICA

v.

FRANKLIN W. JACKSON, APPELLANT

No. 86-3034

UNITED STATES OF AMERICA

v.

GREGORY W. FLETCHER, APPELLANT

Appeals from the United States District Court
for the District of Columbia
(D.C. Criminal Nos. 85-0255-01, 02, & 03)

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Argued May 15, 1987

Decided March 8, 1988

Whitney Debevoise (appointed by this court), with whom *Mark A. Kass* was on the brief, for appellant Jackson.

Steven Schaars, with whom *Leigh Manasevit* was on the brief, for appellant Perholtz.

William L. Gardner (appointed by this court) for appellant Fletcher.

Katherine A. Worthington, Assistant United States Attorney, with whom *Joseph E. diGenova*, United States Attorney, *Michael W. Farrell*, *Brian M. Murtagh*, and *Joseph B. Valder*, Assistant United States Attorneys, were on the brief, for appellee.

Before BORK* and BUCKLEY, *Circuit Judges*, and EDWARD D. RE,** *Chief Judge*, U.S. Court of International Trade.

Opinion PER CURIAM.

PER CURIAM: A jury convicted appellants Perholtz and Jackson of one count of racketeering and thirteen counts of mail fraud in connection with Postal Service and Small Business Administration ("SBA") procurements. The jury convicted appellant Fletcher of ten counts of mail fraud in connection with the same SBA procurement. The jury also found forfeit certain property of Perholtz and Jackson related to their racketeering. Appellants challenge their convictions and the forfeitures on numerous grounds. We affirm in all respects.

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* Judge Bork, a member of this panel at the time of argument, concurred in this opinion but resigned before its issuance.

** Sitting by designation pursuant to 28 U.S.C. § 293(a) (1982).

I. BACKGROUND

In an appeal from a jury's criminal conviction, we recite the evidence presented at trial, as we must ourselves view it, in the light most favorable to the government. *See, e.g., United States v. Huber*, 603 F.2d 387, 391, 395 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980).

A.

As a result of litigation, in 1978 the United States Postal Service initiated procurements to calculate the back pay due some ninety thousand of its workers (a task known as the FLSA Accounting Project) and also to introduce a new payroll system prospectively (the Payroll Redesign Project). At this time, John Gentile, who later testified for the government and repaid $40,000 received as bribes in exchange for immunity from prosecution, was Assistant Postmaster General for Finance. Appellant Perholtz was General Manager for Accounting for the Postal Service until December 1977, when he resigned and formed his own computer systems development firm, ATL, Inc. Appellant Jackson was Manager of the Postal Service's Systems Redesign Branch during this time.

According to Gentile, he and Perholtz had agreed that Perholtz upon his departure from the Postal Service would enter into a consulting contract with a computer company to prepare a proposal for the as-yet unannounced FLSA Accounting Project procurement. Gentile would favor selection of that company's proposal inside the Postal Service in exchange for ten percent of the profits Perholtz would receive upon the proposal's acceptance. At Perholtz's request, Gentile introduced Perholtz to an acquaintance at Systems Development Corporation, with which ATL, Perholtz's corporation, thereafter contracted to prepare the FLSA proposal. Gentile also sent a memorandum, under his signature but written in fact by Perholtz (who was then no longer a Postal Service

employee), to senior management urging the need for an FLSA procurement. When the Postal Service subsequently initiated the procurement, Gentile "pushed for" the Systems Development proposal, as Perholtz by telephone frequently urged him to do. Jackson, who according to Gentile was largely a message-carrier between Perholtz and Gentile on the FLSA procurement, also exhorted Gentile to "push it." But because certain costs in the Systems Development proposal were too high, the Postal Service awarded the contract to another firm. Although Perholtz received $10,000 from Systems Development for his bid preparation work, he received no profits under his consulting contract since the proposal was rejected.

B.

In its first phase, the Postal Service's Payroll Redesign Project was to develop a prototype computerized payroll system, the Automated Time and Attendance Procedures project ("ATAP"). Gentile testified that in early 1978 Perholtz suggested to Gentile and Jackson that the three of them "wire" the ATAP procurement. Perholtz would join with a computer hardware firm to submit an ATAP proposal, for which he would prepare software responsive to the needs of ATAP in exchange for a share of the profits to be generated by the proposal. Jackson, as manager of the Payroll Redesign Project within the Postal Service, would prepare technical aspects of the procurement and require a short response time from bidders. At the same time, Gentile would inform Perholtz in advance of the project's technical requirements. Gentile also agreed to support the Perholtz proposal before senior Postal Service management. If the Postal Service accepted the proposal, the three would share Perholtz's contractual royalties.

Perholtz contacted John Cox of General Scientific Corporation, a manufacturer's representative for Essex Engineering, to propose a consulting agreement with Essex,

in which Essex would provide the hardware and Perholtz the software for a bid on ATAP. At a meeting with Essex representatives, Perholtz stated that he had "contacts" at the Postal Service whom he referred to as "my people." ATL (Perholtz's corporation) entered into a consulting agreement with Essex in May 1978 for software to be used in its ATAP proposal. Perholtz had essentially completed preparation of this software by August 25, 1978, when the Postal Service first requested proposals for the ATAP project. The Postal Service stated that this initial, informal request would be followed by a formal solicitation of bids and, if the government desired, by demonstrations of competitive proposals. The Postal Service also stated that it would not award a contract on the basis of the initial request. Jackson oversaw preparation of the request's technical specifications, which represented a "close fit" with the system of hardware and software already completed by Essex and Perholtz.

In subsequent demonstrations by seven vendors, the Essex submission met ninety-five percent of the requirements. Moreover, it was the only one to provide a demonstration of software as well as hardware. Jackson, who had headed the panel before whom the submissions were demonstrated, thereafter prepared an evaluation of the demonstrations, concurred in by the panel, recommending that Essex receive a sole-source (noncompetitive) contract for ATAP, a result not previously contemplated and one inconsistent with the wholly informational purpose of an informal request. Upon Perholtz's suggestion, Jackson also prepared a study to illustrate the urgency of quickly going forward with ATAP. This study was a key element hastening the contract's award.

When, in January 1979, the Postal Service's procurement department recommended that ATAP be awarded

through a competitive procurement, Perholtz, Jackson, and Gentile met and drafted a responsive memorandum, ultimately sent under Gentile's signature, that recommended a sole-source award to Essex. The Postal Service entered into a letter contract with Essex in March 1979 on a sole-source basis.[1]

Postal Service employees required training to operate the new ATAP system. Perholtz asked Gentile if he knew of a firm that could provide this training; Gentile referred him to the Metropolitan Education and Training Corporation ("Metcor"), owned by James Muldoon. According to Gentile, Perholtz said that he, Gentile, and Jackson would share equally in the commission Perholtz obtained from Metcor. Perholtz then told Mudoon that he, Pehholtz, could obtain the ATAP training work from Essex in return for a ten percent commission. In March 1979, Muldoon signed a marketing agreement with ATL, backdated at Perholtz's request to November 1978. Muldoon, employees of Essex, and employees of the Postal Service, including Jackson, attended a meeting to decide whether the Postal Service or an outside contractor should handle the ATAP training. According to Muldoon, Jackson's statement favoring an outside contractor turned the meeting decisively in Muldoon's favor. Metcor, Muldoon's company, with the approval of the Postal Service, thereafter received a subcontract from Essex for the ATAP training.

Perholtz received more than $187,000 under his contract with Essex, and $9,500 under the agreement with Metcor. Jackson and Gentile each received $27,000, and Jackson also received an interest in a Florida condo-

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[1] The mailings of Essex invoices for payment between Postal Service headquarters in Washington and the Postal Data Center in New York served as the mailings incident to the mail fraud offenses and the racketeering acts concerning the ATAP procurement.

minium, for their participation in the ATAP arrangements.

C.

To monitor the loans and grants it had made nationwide, the Small Business Administration ("SBA") decided to link its many local offices in a data communications system with the central computer in its main office. In November 1979, SBA awarded a one-year sole-source contract for development and implementation of such a system to International Business Services, Inc. ("IBS"). Appellant Fletcher had joined IBS as vice president for operations in April 1979. Upon Fletcher's recommendation, IBS hired Jackson in May 1979. Jackson subsequently became project manager for development of the SBA data communications system, reporting directly to Fletcher, who retained ultimate responsibility for the project. IBS also retained Perholtz as a consultant on the SBA project.

IBS had the authority to enter into subcontracts with other firms, subject to SBA approval, to perform the SBA contract. This case involves four such arrangements.

The first subcontract, for a free-standing printer in each SBA local office, was between IBS and Printer Systems Corporation ("Printer Systems"). Perholtz told Printer Systems' president, Ashby Reid, that he had had a relationship with IBS in the past, that he had learned that IBS was the SBA contractor, and that he could obtain for Printer Systems the stand-alone printer subcontract from IBS. Printer Systems thereafter submitted a proposal to IBS, and in meetings with SBA officials on the proposal, Perholtz acted as Printer Systems' sales representative. IBS and Printer Systems formed a subcontract for the printers in November 1979.

According to Gentile and Muldoon, in meetings attended by Muldoon, Jackson, and Fletcher, Perholtz pro-

posed to use the proceeds of the Printer Systems subcontract to pay Gentile and Jackson the amounts owed them for their roles in the ATAP scheme. In accord with this plan, Gentile used his wife's fabric company to enter into a marketing agreement with Printer Systems. Printer Systems would pay the company (and ultimately charge SBA) unearned commissions on its sales of printers to IBS. Gentile would then split the payments with Jackson.[2] Neither Gentile, his wife, nor his wife's company did anything to further the sales from Printer Systems to IBS.

The second subcontract involved cathode ray tube terminals ("CRTs") and printers joined to the terminals. To obtain these items, Perholtz again turned to John Cox of General Scientific Corporation. Perholtz told Cox that he and Conley Dillon, a long-time acquaintance, were forming a marketing corporation, and that General Scientific should pay Dillon any commissions from printer sales to IBS. Thereafter, Perholtz asked Dillon, a full-time employee of the Department of Labor, to sign a marketing agreement and receive commission payments from General Scientific, in return for which Dillon would retain six percent of the commissions and Perholtz would receive the rest. (Perholtz said that a conflict of interest prevented him from taking the commissions directly.) Dillon then signed a marketing agreement with General Scientific, backdated before General Scientific's

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[2] Under the agreement between Gentile's wife's company and Printer Systems, commissions were due upon invoicing to IBS. Perholtz told Gentile that Jackson would know of the invoices' receipt and thus know when Printer Systems owed them the fake commissions. Upon receipt of an invoice, Jackson would contact Gentile to confirm that Gentile had received payment from Printer Systems. Jackson then would pick up his share of the money from Gentile in the form of a check payable to Computer Consultants International, a corporation apparently controlled by Perholtz. Under this arrangement, Gentile wrote checks totalling some $27,000.

first contact with the SBA; Cox signed this agreement without ever meeting Dillon.

Although IBS did purchase one demonstrator printer, the SBA ultimately rejected the printer, while General Scientific decided not to pursue the CRT sales. Therefore, in December 1979, Perholtz told Dillon that the General Scientific deal was off. He proposed instead an arrangement with Printer Systems Leasing Corporation ("Printer Leasing"), an affiliate of Printer Systems, the firm Perholtz had previously used in the procurement of stand-alone printers. Dillon then signed a marketing agreement with Printer Leasing parallel to the General Scientific agreement; again, Dillon never made any effort to market the equipment.

When Perholtz presented the marketing agreement to Printer Leasing, its counsel objected since Dillon had never done anything for Printer Leasing and indeed had never even met anyone at Printer Leasing. Perholtz replied that he owed Dillon a debt that the commissions from Printer Leasing would satisfy. Perholtz stated further that he controlled whether Printer Leasing received business from IBS, and that the only way it would receive the business was to execute the marketing agreement with Dillon. Counsel also requested of Perholtz, but never received, a waiver from IBS of any objection to Perholtz's receipt of commissions from Printer Leasing. Ashby Reid, Printer Leasing's president, nonetheless signed the agreement.[3]

Printer Leasing ultimately leased the CRTs and sold the associated printers to IBS for the SBA data com-

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[3] Although the United States sought to bring charges against Reid for his role in the ATAP and SBA procurements, he was not a defendant in the case below, and the information filed against him was voluntarily dismissed.

munications system; Dillon received unearned commissions on these sales of about $137,000.[4]

The third subcontract required by the SBA system was a front-end processor in each local office to control its data communications with the central office. In late 1979, Ecotran-Chi ("CHI") agreed to lease such processors to IBS. But CHI, finding that it could not finance a leasing arrangement, sought in February 1980 to sell its processors to a third party that would lease them to IBS. Upon Perholtz's suggestion, Printer Systems bought the processors and leased them to IBS. As the sale was moving toward completion, Printer Systems entered into joint venture and profit distribution agreements with ATL, Perholtz's company. The agreements granted ATL (which had put up no capital) half ownership of the CHI processors and half the profits from their lease in exchange for ATL's promise not to compete with Printer Systems for the SBA leases and its assistance negotiating the lease agreements between SBA and Printer Systems. Printer Systems paid ATL approximately $300,000 in profits derived from the leases.[5]

The fourth subcontract required by the SBA's data communications system concerned installation and maintenance. On the recommendation of Printer Systems' Reid, Perholtz contacted Lloyd Root, the owner of Com-

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[4] Printer Leasing paid most of this money in the form of checks to Computer Consultants, an entity also used to funnel ATAP bribes to Gentile and Jackson. *See supra* n.2.

[5] In late 1982, Perholtz had Dillon sign yet another marketing agreement, this time with ATL, backdated to before the CHI-Printer Systems sale. Dillon was to assist ATL in obtaining financing for the sale; not only did Dillon do nothing to this end, but Printer Systems, not ATL, was charged with lining up financing. Dillon nonetheless received $25,000 from ATL under this agreement, which he testified was designed to move funds into the Computer Consultants' bank account for Perholtz's purchase of a boat called "The Mistress."

puter Systems Support Corporation ("CSSC"), which had previously maintained Printer Systems' equipment. In a meeting to discuss the subcontract, Perholtz said that he could make sure that CSSC would receive the contract, and in January 1980 it did. Soon after the SBA approved the installation and maintenance contract between CSSC and IBS, CSSC assigned the contract to Remote Computer Services, Inc., a corporation formed for the purpose and owned in equal shares by Reid, Root, and Perholtz (while he was still an IBS consultant). The assignment was effected without notice to SBA, and despite the assignment CSSC did all maintenance and installation work. SBA paid CSSC $809,000, and CSSC transferred $347,000 to Remote. Remote in turn disbursed approximately $151,000 to Perholtz, $143,000 to Reid, and $9,500 to Root (the owner of CSSC).[6]

D.

Computer Consultants International, Inc. ("Computer Consultants") was the conduit through which bogus commissions arising from the SBA's data communications project reached Jackson and Fletcher via Dillon.[7] According to Dillon, Perholtz told him to turn Computer Consultants over to Fletcher and Jackson to pay them for their roles in the SBA project.[8] At a subsequent

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[6] Perholtz also was paid $84,000 by CSSC for preparing its invoices to IBS, a task otherwise performed by a secretary.

In addition, Perholtz persuaded Dillon to sign a backdated sham marketing agreement with Remote. Dillon again did nothing, and in due course a check for some $48,000 issued to Computer Consultants.

[7] Checks mailed by the government to IBS and Printer Systems were the predicate mailings for the SBA mail fraud counts and together constituted a single predicate racketeering act for the racketeering count.

[8] At Perholtz's request, Dillon had previously used Computer Consultants' funds to rent a Florida condominium owned by Fletcher and Jackson. Perholtz had told Muldoon that he and Jackson were to buy this condominium with their

meeting, Fletcher told Dillon to convert Computer Consultants' funds into cash or gold. Dillon complied and gave Fletcher and Jackson about $83,000.[9]

In September 1980, Jackson left IBS and returned to the Postal Service, where he resumed management of the Payroll Redesign Project, now in a phase called "STARS." Fletcher subsequently left IBS as well and formed a corporation called Computer Contemporaries, Inc. ("Compucon"), which entered into a consulting arrangement with Stanford Research Institute, a bidder on the STARS project. Perholtz had a contractual relationship with Honeywell, a competing bidder on the project. The STARS project was ultimately cancelled without award.

Fletcher also participated in a bid by Booz, Allen and Hamilton for a Postal Service contract in a project called "PRISM," of which Jackson was co-director. Fletcher persuaded Dillon to execute a backdated "service agreement" between Compucon and Computer Consultants.[10] Dillon again did nothing pursuant to the agreement, but received $135,000 from Compucon.[11]

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proceeds from ATAP; Fletcher later acquired his interest in the condominium from ATL, Perholtz's company. Dillon paid about $20,000 in rent to Jackson and Fletcher although he never used the condominium and only visited it after the government initiated the investigation in this case.

[9] In 1983, after the government had subpoenaed Computer Consultants' records, Perholtz returned to Dillon the cash and gold Dillon had given Fletcher and Jackson.

[10] Perholtz originally obtained the incorporation papers for Computer Consultants from Fletcher, and the contents of those papers were substantially identical to Compucon's later-filed articles of incorporation.

Perholtz in 1983 persuaded an acquaintance to acquire Compucon from Fletcher with funds loaned by Computer Consultants, which eventually itself acquired Compucon.

[11] Fletcher also teamed up with another successful bidder, Coopers & Lybrand, in a Postal Service project called "FIRM," of which Jackson was in charge.

In 1983, after the government had subpoenaed the records of Computer Contemporaries, Perholtz wrote a long document called "Issues," subsequently referred to as the "script," and told Dillon to absorb its contents. This document discusses extensively everything that Dillon was supposed to have done under the various agreements he had signed. Dillon knew little of what was in the document; prior to his plea agreement, he attempted to memorize it.

E.

The fifteen-count indictment under which this case went to trial was returned in August 1985. Count I charged Perholtz and Jackson, under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(d) (1982), with conspiracy to enrich an "enterprise," as defined in RICO, *id.* § 1961(4), through bribery, kickbacks, and mail fraud spanning all the Postal Service and SBA procurements discussed above.[12] The

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[12] The indictment charged an enterprise as follows:

> Defendant RONALD J. PERHOLTZ, defendant FRANKLIN W. JACKSON, John L. Gentile (an unindicted co-conspirator), Gregory W. Fletcher, Ashby R. Reid, Jr., Conley H. Dillon, Jr., Lloyd E. Root, Jr., ATL Corporation, IBS, Printer Systems Corporation . . ., Printer Systems Leasing Corporation . . ., Computer Systems Support Corporation . . ., Remote Computer Services Corp., Computer Consultants International, Inc., Professional Design Services, Fairlington Properties, Southern Properties, and Computer Contemporaries, Inc., constituted an enterprise, as that term is defined by Title 18, United States Code, Section 1961(4) to wit, a group of individuals, partnerships, and corporations associated in fact to unjustly enrich themselves from the proceeds of government contracts and subcontracts, for computer services and equipment, which had been and would be obtained by means of bribery, fraud, and circumvention of government contracting procedures designed to secure for the United States government the benefits of competition.

government moved to dismiss this count at the close of its case.

Count II charged Perholtz and Jackson with participation in the affairs of the same enterprise alleged in count I, through a pattern of racketeering comprised of thirty-seven racketeering acts. Racketeering act one charged Perholtz and Jackson with agreement to commit bribery in the Postal Service's FLSA project. Racketeering act two charged them with bribery in the ATAP project. Acts three through thirty-six charged various instances of mail fraud in ATAP. Act thirty-seven charged mail fraud through multiple mailings in the SBA data communications procurement. Count II sought forfeiture from Perholtz and Jackson of assets related to their racketeering under 18 U.S.C. § 1963(a) (1982).

Counts III, IV, and V charged Perholtz and Jackson with mail fraud in connection with the ATAP procurement. Counts VI through XV charged Perholtz, Jackson, Fletcher, Root, and Dillon with mail fraud in connection with the SBA's data communications procurement.[13]

F.

In a pretrial hearing before Judge Gerhard A. Gesell, Perholtz requested a separate evidentiary proceeding for the forfeiture count, to be convened before the jury only if the jury found Perholtz guilty under RICO.[14] The court denied the motion.[15]

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[13] Before trial, Dillon pleaded guilty to subscribing to a false federal income tax return and agreed to testify for the prosecution; the charges against him were dropped.

[14] Jackson, the other RICO defendant, preferred a single evidentiary proceeding regarding guilt and forfeiture.

[15] The court instructed the jury not to consider forfeiture unless, in their deliberations, they previously had found them guilty of the RICO count.

During trial, the government questioned an official of Printer Systems concerning statements by Perholtz about the desirability of incorporating an entity in the Cayman Islands, and cross-examined defendant Jackson as to whether he or Fletcher had established a bank account there. In the government's rebuttal at closing argument, the prosecutor suggested that ill-gotten gains from the SBA scheme had ended up in the Caymans.

G.

The jury found Perholtz, Jackson, and Fletcher guilty on all counts but acquitted Root. On count II, the jury found racketeering acts two through thirty-seven as charged, but exonerated Perholtz and Jackson of act number one, bribery in the FLSA procurement. The jury also declared forfeit most of the items named in the indictment, including all of Perholtz's stock in ATL and all bank accounts in ATL's name. Perholtz, Jackson, and Fletcher received prison terms of ten, seven, and four years, respectively.

II. Discussion

A. Plain Error Rule

Many of appellants' claims of error were raised for the first time on appeal. Ordinarily, a party waives his right to appeal a trial court's ruling if he fails to object below. Federal Rule of Criminal Procedure 52(b), however, provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." In a recent discussion of the rule, the Supreme Court stated:

> The plain-error doctrine . . . tempers the blow of a rigid application of the contemporaneous-objection requirement. The Rule [52(b)] authorizes the Courts of Appeals to correct only "particularly egregious errors," those errors that "seriously affect the fairness, integrity or public reputation of judicial pro-

> ceedings." In other words, the plain-error exception to the contemporaneous objection rule is to be "used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." Any unwarranted extension of this exacting definition of plain error would skew the Rule's "careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed."

United States v. Young, 470 U.S. 1, 15 (1985) (footnote and citations omitted). Applying this restrictive standard of review to the issues discussed below, we conclude that appellants have not established plain error.

B. The Indictment Properly Charged an Association-in-Fact

Appellants claim that the indictment improperly charged an association-in-fact composed of individuals, corporations, and partnerships. As none of the appellants objected at trial to the wording of the indictment, we review the claim under the plain-error standard. *Jackson v. United States*, 359 F.2d 260, 265 (D.C. Cir.) (plain-error rule applies to defects in indictment), *cert. denied*, 385 U.S. 877 (1966).

Under RICO, " 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (1982). Appellants claim that the government must choose between charging an individual, partnership, or corporation, on the one hand, and an association-in-fact on the other hand. Appellants argue that the indictment in this case was fatally flawed because it charged individuals, corporations, and partnerships associated in fact. The relevant portion of the indictment is reproduced *supra* at 13 n.12.

We are unpersuaded. The statute defines "enterprise" as *including* the various entities specified; the list of entities is not meant to be exhaustive. "There is no restriction upon the associations embraced by the definition . . . ." *United States v. Turkette*, 452 U.S. 576, 580 (1981). On the contrary, Congress has instructed us to construe RICO "liberally . . . to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970) (*reprinted in note following* 18 U.S.C. § 1961), *quoted in Turkette*, 452 U.S. at 587; *accord Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497-98 (1985). Appellants' restrictive interpretation of the definition of enterprise would contravene this principle of statutory construction.

Appellants' reading of section 1961(4) would lead to the bizarre result that only criminals who failed to form corporate shells to aid their illicit schemes could be reached by RICO. This interpretation hardly accords with Congress' remedial purposes: to design RICO as a weapon against the sophisticated racketeer as well as (and perhaps more than) the artless. *See United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); *see also McCullough v. Suter*, 757 F.2d 142, 143-44 (7th Cir. 1985) ("we do not suppose that 'Murder Inc.' was really a corporation; and we cannot believe that Congress would have wanted gangsters [associated in fact] to be able to escape the clutches of section 1962(c) just by avoiding the corporate form").

We therefore follow those courts that have held that individuals, corporations, and other entities may constitute an association-in-fact. *See United States v. Thevis*, 665 F.2d 616, 625-26 (5th Cir. Unit B), *cert. denied*, 456 U.S. 1008 (1982); *see also United States v. Navarro-Ordas*, 770 F.2d 959, 969 n.19 (11th Cir. 1985) (group of corporations may constitute association-in-fact), *cert. denied*, 475 U.S. 1016 (1986); *McCullough*, 757 F.2d at 143-44 (sole proprietorship and employees may constitute

association-in-fact); *United States v. Aimone*, 715 F.2d 822, 828 (3d Cir. 1983) (individuals and corporations may constitute association-in-fact), *cert. denied*, 468 U.S. 1217 (1984); *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1285 (7th Cir. 1983) ("enterprise" includes all enumerated entities and any combination of them); *Huber*, 603 F.2d at 394 (group of corporations may constitute association-in-fact).

Appellant Perholtz makes the further claim that the indictment named him both as a part of the enterprise and as a defendant, in contravention of the requirement that the "person" be separate from the "enterprise" with which he is associated under 18 U.S.C. § 1962(c) (1982). *See Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, No. 86-5136, slip op. at 13-17 (D.C. Cir. Feb. 12, 1988). We have no occasion to consider the separateness requirement, however, because the indictment does not run afoul of this principle. The indictment charged that Perholtz, along with other individuals and corporations, formed an enterprise, i.e., an association-in-fact. The indictment further alleged that Perholtz participated in the conduct of the enterprise by his various actions in furtherance of its common objectives. This case thus is significantly different from the cases relied upon by Perholtz, *e.g.*, *Bennett v. United States Trust Co.*, 770 F.2d 308, 314-15 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986), holding that a corporation cannot be both the enterprise and the defendant under section 1962(c) because it cannot associate with itself. The indictment did not allege that Perholtz associated with himself, but that he associated with others. That is the very meaning of an *association*-in-fact. *Cf. United States v. Benny*, 786 F.2d 1410, 1415-16 (9th Cir.) (defendant may be charged as member of association-in-fact or as participant in conduct of own sole proprietorship provided it has employees), *cert. denied*, 107 S. Ct. 668 (1986); *McCullough*, 757 F.2d at

143-44 (same). Nor were Perholtz and the other members of the enterprise merely "subdivisions, agents, or members of the defendant organization." *Yellow Bus*, slip op. at 16. The individual defendants joined with each other and formed the corporations to further their common objectives. This relationship of individuals and corporations is precisely what section 1962(c) was designed to attack.

C. Appellants Have Failed to Establish a Variance Between Proof and Indictment

To sustain a RICO conviction, as charged in this case, the government must prove beyond a reasonable doubt that an enterprise existed as charged in the indictment; that the enterprise affected interstate commerce; that the defendant was associated with the enterprise; and that the defendant knowingly participated, even indirectly, in the conduct of the enterprise through a pattern of racketeering. *See Martin-Trigona v. Smith*, 712 F.2d 1421, 1426 n.6 (D.C. Cir. 1983); 18 U.S.C. § 1962(c) (1982). Defendants Perholtz and Jackson contest the trial judge's ruling that the evidence is sufficient to establish the existence of a single racketeering enterprise as charged in the indictment. The defendants assert that the evidence, viewed most favorably to the government's position, reveals either two or three separate enterprises. Hence, it is urged that this alleged variance between indictment and proof requires reversal of the RICO convictions.

Title 18 U.S.C. § 1961(4) (1982) provides that an "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." We conclude *infra* at 37 that the enterprise is established by common purpose among the participants, organization, and continuity. The evidence here was sufficient for the jury to conclude that these elements were established with respect to a single enterprise.

The participants in the enterprise were either individuals who sought financial gain from the award of government contracts, or were corporations, controlled as a practical matter by those individuals, who were instrumental in executing the charged schemes. The goal of obtaining the proceeds of government contracts for computer services and equipment through the perversion of the bidding process motivated the members of the associational enterprise at all relevant times. *See United States v. Lemm*, 680 F.2d 1193, 1199 (8th Cir. 1982), *cert. denied*, 459 U.S. 1110 (1983).

The elements of continuity of structure and personnel were evident despite some changes in personnel between schemes, and despite the fact that every participant did not play an identical role in each scheme. *See United States v. Tillett*, 763 F.2d 628, 631-32 (4th Cir. 1985); *United States v. Cagnina*, 697 F.2d 915, 921-22 (11th Cir.), *cert. denied*, 464 U.S. 856 (1983); *see also United States v. Riccobene*, 709 F.2d 214, 223 (3d Cir.) (the continuity requirement "does not mean that individuals cannot leave the group or that new members cannot join at a later time"), *cert. denied*, 464 U.S. 849 (1983). Perholtz exhibited a leadership role throughout the period that the enterprise was functioning, although his nominal position was that of a consultant. Jackson, both as a Postal Service official and as an executive of IBS, used his position to direct contracts to entities with which Perholtz was associated. *Cf. United States v. Bledsoe*, 674 F.2d 647, 666 (8th Cir.) (appearance of disjunctive ventures and refusal of certain participants to cooperate with each other militates against finding of continuity of personnel), *cert. denied*, 459 U.S. 1040 (1982), *noted in Lemm*, 680 F.2d at 1200.

The evidence revealed that Perholtz suggested to Gentile and Jackson that they "wire" the ATAP proposal. In his meeting with Essex officials, Perholtz's reference to Postal Service employees as "my people" strongly sug-

gested that he might exercise substantial influence over the award of contracts. Perholtz was largely responsible for a memo sent over Gentile's signature which suggested that Essex be awarded a sole-source contract. In meetings attended by Jackson, among others, it was Perholtz who suggested using the proceeds of the Printer Systems contracts to pay Jackson and Gentile for their roles in the ATAP scheme. Perholtz stated to counsel for Printer Leasing that it was he who determined whether the firm would receive business from IBS. Perholtz also instructed Dillon as to how Fletcher and Jackson would be paid for their roles in the SBA project. Subsequently, when the government's investigation jeopardized the continuance of the enterprise's illegal activities, it was Perholtz who drafted the script for Dillon to memorize.

With regard to Jackson, the evidence demonstrated that he used his position at the Postal Service to direct the ATAP contract to Essex (with which Perholtz, through ATL, had contracted to be a consultant). For the SBA scheme, Jackson was hired by IBS at the suggestion of Fletcher, and later became project manager for development of the SBA data communications systems.

Perholtz became a consultant to IBS. Fake commissions from the Printer Systems subcontract on the SBA communications project were funnelled through Computer Consultants, another entity controlled by Perholtz, in order to pay Jackson and Gentile for their roles in the ATAP scheme. Jackson later returned to the Postal Service to assume a management role in the PRISM and FIRM projects, and in the STARS project, a later phase of the Payroll Redesign Project. In sum, the existence of a continuing core of personnel motivated by a common interest is sufficient to constitute the association-in-fact enterprise. *See United States v. Errico*, 635 F.2d 152, 156 (2d Cir. 1980) (a group of bettors linked to a group of jockeys through the defendant constitute an enterprise where all were acting with the purpose of "fixing" horse races), *cert denied*, 453 U.S. 911 (1981).

In light of the foregoing, we agree with the trial judge's statement that

> [a] reasonable juror could conclude from the evidence that the members of the enterprise were all linked together by a network of contracts, transactions and pay-offs orchestrated and organized by defendant Perholtz with the knowing and willful participation and assistance of others. The interlocking nature of the schemes and the overlapping nature of the wrongdoing provides sufficient evidence for the jury to conclude that this was a single enterprise that started with the alleged conspiracy of Perholtz, Jackson and Gentile and added or dropped members over time as the scheme became more complex and expansive.

We are also mindful of the jury's inquiry into the existence of the enterprise, and the deference to be accorded to the results of that inquiry. *United States v. Hewes*, 729 F.2d 1302, 1311 (11th Cir. 1984), *cert. denied*, 469 U.S. 1110 (1984); *Riccobene*, 709 F.2d at 222. Our task is to determine whether there is substantial evidence, viewed most favorably to the prosecution, to support the verdict. *Burks v. United States*, 437 U.S. 1, 17 (1978). We need not parse the enterprise's numerous and wide-ranging activities in an effort to decide whether we subjectively consider those activities to be more properly consistent with a finding of one, two, or three distinct enterprises.

Even if appellants could establish a variance between proof and indictment, that variance must be prejudicial to warrant the reversal of their convictions. *See Dunn v. United States*, 442 U.S. 100, 105-06 (1979); *Berger v. United States*, 295 U.S. 78, 82 (1935); *United States v. Mangieri*, 694 F.2d 1270, 1278 (D.C. Cir. 1982). Prejudice arises in cases in which a defendant is deprived of notice of the charges against him, when he is inadequately protected against reprosecution, or when he is deprived of the right to be tried only on charges presented

in an indictment returned by a grand jury. *Stirone v. United States*, 361 U.S. 212, 217 (1960); *United States v. Lemire*, 720 F.2d 1327, 1344 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984); *Gaither v. United States*, 413 F.2d 1061, 1071-72 (D.C. Cir. 1969). Prejudice has not been shown in this case, and we conclude that there is substantial evidence to support the jury's decision and that there was no variance between proof and indictment.

D. Evidentiary Issues

1. *The Trial Court Properly Admitted Evidence of the Script*

Defendants Perholtz and Jackson contend that the admission into evidence of the "script" prepared for Dillon by Perholtz was error. The document, they argue, (1) does not qualify as a co-conspirator statement pursuant to Federal Rule of Evidence 801(d)(2)(E),[16] (2) amounts to proof of uncharged crimes of obstructing the grand jury and suborning perjury, and (3) is far more prejudicial than probative pursuant to Federal Rule of Evidence 403. At trial, only counsel for Root, a codefendant who subsequently was acquitted, objected to the introduction of the script *under Rule 403*. As no objection was made under Rule 801(d)(2)(E), and the trial court's inquiry differs significantly under these two rules, the plain-error standard applies to appellants' hearsay claims.

The Supreme Court has "affirm[ed] the validity of the use of co-conspirator statements" in trials conducted in federal courts. *United States v. Inadi*, 475 U.S. 387, 400 (1986); *see also Bourjaily v. United States*, 107 S. Ct. 2775, 2783 (1987) (emphasizing that the co-conspirator

[16] Federal Rule of Evidence 801(d)(2)(E) provides that "[a] statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

exception is "steeped in our jurisprudence"). "Fed. R. Evid. 801(d)(2)(E) embodies the longstanding doctrine that when two or more individuals are acting in concert toward a common goal, the out-of-court statements of one are not hearsay and are admissible against the others, if made in furtherance of the common goal." *United States v. Weisz*, 718 F.2d 413, 433 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1027, 1034 (1984). The statements of joint venturers may fall within the scope of the Rule, and there is no requirement that a conspiracy be formally charged in the indictment. Fed. R. Evid. 801 Senate Judiciary Committee notes; *United States v. Jackson*, 627 F.2d 1198, 1216 (D.C. Cir. 1980).

In order to admit co-conspirator statements, the trial judge must determine that a conspiracy existed, that the co-conspirator and the defendant against whom the statement is offered were members of the conspiracy, and that the statements were made in furtherance of the conspiracy. *United States v. Gantt*, 617 F.2d 831, 844 (D.C. Cir. 1980). The defendants do not specifically challenge the existence of the first two elements. Rather, they rely on *Krulewitch v. United States*, 336 U.S. 440 (1949), and its progeny, for the proposition that statements made "during a subsequent period when the conspirators were engaged in nothing more than concealment of the criminal enterprise," are inadmissible as they are not in furtherance of the conspiracy. *Dutton v. Evans*, 400 U.S. 74, 81 (1970) (plurality opinion) (citing *Lutwak v. United States*, 344 U.S. 604 (1953), and *Krulewitch v. United States*, 336 U.S. 440 (1949)). This, however, does not "mean that acts of concealment can never have significance in furthering a criminal conspiracy." *Grunewald v. United States*, 353 U.S. 391, 405 (1957). The *Grunewald* decision indicates that "acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy" may be considered to be in furtherance of the conspiracy within the meaning of the co-conspirator hearsay exemption. *Id.* (emphasis in original).

On the facts presented, the trial judge was amply justified in concluding that the script was prepared while the "conspiracy [was] still alleged to be continuing, and actively continuing." For example, the scheme relative to the STARS project was continuing, and the parties had not received payments from the PRISM and FIRM contracts. The main purpose of the scheme, to collect government funds from improperly awarded contracts and then distribute the proceeds among the conspirators. had not been fully achieved at the time of the creation of the script. In short, Perholtz's attempts "to influence witnesses were not acts of concealment related only to a past objective. They were parts of continuing activity that was essential to and therefore in furtherance of the survival of an ongoing operation." *United States v. Del Valle*, 587 F.2d 699, 704 (5th Cir.), *cert. denied*, 442 U.S. 909 (1979). As noted by this court in *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976) (en banc), *cert. denied*, 431 U.S. 933 (1977), in explaining its holding that narratives of past events may constitute statements "in furtherance of" a conspiracy:

> As the threads of the cover-up began to unravel, it became increasingly important to review what had taken place in order to identify and shore up the loose ends. It became critical for the conspirators to try to ensure that any story they wished to present would not ring false and that any action they were considering would not backfire, a strategy whose success required total familiarity with the facts.

Haldeman, 559 F.2d at 110-11 (footnote omitted). In this case, furthering the conspiracy depended upon Dillon's familiarity with the "facts" as explained by Perholtz in the script. For this additional reason, the script is not hearsay because it is not being "offered in evidence to prove the truth of the matter[s] asserted." Fed. R. Evid. 801(c); *Anderson v. United States*, 417 U.S. 211, 219-20 (1974).

In *United States v. Bruner*, 657 F.2d 1278 (D.C. Cir. 1981), the court rejected a hearsay challenge to evidence introduced during a prosecution for conspiracy to obtain narcotics from physicians for illegal resale. The government introduced into evidence prescriptions containing patients' names and addresses, as well as the names and dosages of the substances to be dispensed. The court upheld admission of the prescriptions noting that the prosecutor did not attempt to prove that the information contained in the prescriptions was correct. The government merely wanted to show that these prescriptions were used to obtain narcotics. *Bruner*, 657 F.2d at 1284. Similarly, in this case, the government did not intend to show that any particular item contained in the script was true. To the contrary, the purpose was to show that the information in the document was false; to wit, that Dillon knew little about the services supposedly rendered pursuant to various agreements he had made. *See Anderson*, 417 U.S. at 220 & n.9.

Having concluded that evidence of the script is not objectionable on hearsay grounds, the court must now consider whether it should have been excluded under Federal Rule of Evidence 404[17] and 403.[18] *See, e.g., United*

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[17] Rule 404 provides in material part:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[18] Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

States v. Foskey, 636 F.2d 517, 523 (D.C. Cir. 1980). With respect to Rule 404, despite defense counsel's suggestions to the contrary, the evidence was not offered to prove that the defendants are persons of 'bad character and thus predisposed to commit the crime[s] for which [they are] on trial." *Foskey*, 636 F.2d at 523; *see also* Fed. R. Evid. 404 advisory committee notes (bad acts not admissible "to prove character as a basis for suggesting the inference that conduct on a particular occasion was in conformity with it"). Rule 404 "countenances admission of 'bad acts' evidence that is relevant to any material issue in the case except to show the likelihood that, having once fallen into sin, a second slip is likely." *United States v. Lavelle*, 751 F.2d 1266, 1275 n.11 (D.C. Cir.) (quoting *United States v. James*, 555 F.2d 992, 999 (D.C. Cir. 1977)), *cert. denied*, 474 U.S. 817 (1985). The evidence is highly probative of efforts to further an ongoing scheme to defraud and demonstrate conscious awareness of guilt on the part of the defendants. *See United States v. Hammond*, 781 F.2d 1536, 1540 (11th Cir. 1986); *United States v. Bongard*, 713 F.2d 419, 420-21 (8th Cir. 1983); *United States v. Turner*, 485 F.2d 976, 985 (D.C. Cir. 1973) (remarks of Leventhal, J.); *United States v. Cirillo*, 468 F.2d 1233, 1240 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973).

With respect to Federal Rule of Evidence 403, it is true that, although evidence is relevant, it may still be excluded under the rule if its probative value is substantially outweighed by unfair prejudice. *United States v. Payne*, 805 F.2d 1062, 1066 (D.C. Cir. 1986); *United States v. Hernandez*, 780 F.2d 113, 118 (D.C. Cir. 1986). The balancing of probative value versus prejudicial effect required by Rule 403 is, of course, committed to the discretion of the trial judge. *Carter v. District of Columbia*, 795 F.2d 116, 126 (D.C. Cir. 1986); *see also United States v. Wright*, 489 F.2d 1181, 1186 (D.C. Cir. 1973)

(trial court's discretion not to be disturbed "save for grave abuse"). It has been stated that, at least in close cases, "under Rule 403 the balance is tilted toward admission of evidence." *Hernandez*, 780 F.2d at 118 (citing *United States v. Moore*, 732 F.2d 983, 989 (D.C. Cir. 1984)).

The creation of the script occurred as the scheme to defraud was continuing. *See United States v. Sutton*, 801 F.2d 1346, 1362 (D.C. Cir. 1986); *Lavelle*, 751 F.2d at 1277; *cf. Foskey*, 636 F.2d at 525 ("bad act" occurred over two years prior to offense charged). This type of evidence did not require the jury "to pursue a complex chain of inferences arising from circumstantial evidence." *Moore*, 732 F.2d at 989. Since Dillon's testimony regarding the creation of the script was clearly a question for the jury and not this court, the jury could properly infer that the defendants were conscious of their roles in the scheme. *Moore*, 732 F.2d at 989 n.45; *Lavelle*, 751 F.2d at 1277 n.14. Furthermore, the script evidence is closely tied to the crimes charged and only indirectly suggests distinct offenses. *Payne*, 805 F.2d at 1066 n.5; *United States v. McDowell*, 762 F.2d 1072, 1075 n.3 (D.C. Cir. 1985).

It should also be noted that this case does not involve past acts having little temporal or logical connection to the crimes at issue. *Cf. Hernandez*, 780 F.2d at 118 (defendant's indecipherable shouting at an earlier fight inadmissible as evidence of motive to possess unregistered gun); *Foskey*, 636 F.2d at 524 (defendant's bad act consisted of accompanying an individual carrying concealed narcotics). The prosecutor did not infect the case with innuendo tainting the character of the defendants. *cf. United States v. Shelton*, 628 F.2d 54, 58 (D.C. Cir. 1980); *Frank v. United States*, 262 F.2d 695, 696-97 (D.C. Cir. 1958), and did not present copious details of sordid past acts. *Cf. United States v. James*, 555 F.2d 992, 1000 (D.C. Cir. 1977). Nor is it a case where

evidence is presented in such a manner as to highlight its inflammatory qualities and de-emphasize its potentially probative aspects. *Cf. Carter*, 795 F.2d at 128 (long excerpts of newspaper articles containing inflammatory matter read into record). Indeed, the trial judge, in an effort to minimize any prejudicial effect, ordered counsel to refrain from making any reference to the subornation of perjury or to the obstruction of justice. He also charged the jurors that evidence of fabrication "does not create an impression of guilt," and, although they might consider it as indicative of consciousness of guilt, they were not required to do so.

In sum, the evidence tended to reveal Perholtz's "management role in the conspiracy—to show his particular relationship to the conspiracy and to the other conspirators." *Bruner*, 657 F.2d at 1293. While the evidence was "damning . . . its introduction was [not] error." *Cirillo*, 468 F.2d at 1240. Hence, there is no ground upon which to upset the ruling of the trial court on the admissibility of the script.

2. *Evidence of Other Schemes*

Although the government moved to dismiss count I of the indictment at the end of its case, *see supra* at 14, the district judge did not instruct the jury to ignore the evidence introduced by the government in connection with that count. Appellants did not request such an instruction, but argue to us that the failure of the court to so instruct the jury *sua sponte* was reversible error. We review this claim under the plain-error standard, which applies with special force to these facts. Appellants' failure to object below served their tactical objectives. When the government moved to dismiss count I on the condition that the evidence introduced on that count be submitted to the jury as probative of the rest of its case, appellants weighed the relative value of a dismissal of count I versus the effect of the evidence. Appellants

chose the dismissal, but now seek to exclude the evidence as well.

As noted *supra* at 20, the government was obliged to prove that the association-in-fact had a continuity of structure and personnel in order to establish the existence of an enterprise. The evidence relating to the STARS, PRISM, and FIRM schemes (charged in count I) was probative of continuity; it tended to establish that many of the same players associated in a similar manner and for similar purposes. In particular, Perholtz was the leader and Jackson was the insider in the STARS, PRISM, and FIRM schemes as well as the ATAP and earlier SBA schemes. As the evidence tended to prove the continuity of the association-in-fact, no cautionary instruction was necessary. *Cf. United States v. Celaya-Garcia*, 583 F.2d 210, 212 (5th Cir. 1978) (evidence of transaction involving defendant occurring two months after transaction charged in indictment properly admitted without cautionary instruction because it demonstrated continuing plan of conspiracy), *cert. denied*, 440 U.S. 926 (1979). Certainly, the failure to give a cautionary instruction was not plain error.

Therefore, we do not reach the government's claim that the evidence was admissible under Federal Rule of Evidence 404(b) as showing common scheme, pattern, plan, or intent. Brief for the United States at 57.

E. The Prosecutor's Closing Remarks Do Not Warrant Reversal of the Convictions

Defendants Fletcher and Jackson also assert that the prosecutor's questioning of Jackson on cross-examination, and the reference in his rebuttal closing argument to the possible secretion of funds in the Grand Cayman Islands ("Islands") "had a material, critical impact on the jury's consideration of [the defendants'] guilt." This assertion requires an examination of the relevant facts

to determine whether the prosecutor's remarks constitute "plain error."

Mr. Simpson, the Vice-President of Printer Systems, testified for the government that Perholtz had suggested to Reid (President of Printer Systems) that a corporation be formed in the Islands for tax purposes, and that, if cash was needed, one could go there and "stuff [his] pockets." On direct examination, Jackson testified about trips taken to the Islands with Fletcher to investigate investment opportunities in real estate. On cross-examination, he admitted being present in banks on the Islands. He denied, however, having any bank account in the Islands, and did not know whether Fletcher had opened an account. After the government had completed its case-in-chief, it received documents from the Islands revealing that Fletcher had opened accounts in the name of Compucon, Ltd. The government moved to re-open its case to present this evidence. The trial judge denied this motion noting that to reopen might result in an unwarranted extension of an already lengthy trial. In particular, Fletcher would be entitled to show that these accounts had no connection with the charged scheme, and instead represented an attempt to conceal assets from his wife in connection with his pending divorce. The trial judge also observed that the evidence "does not go directly to any essential issue in the case but is presented for the purpose of drawing inferences as to the source of the funds and motives for concealing it in foreign accounts." Finally, the judge stated that the "dates and activity in the account reflected in Government Ex. 700B (id.) strongly suggests the principal inference the United States urged at oral argument is very dubious and perhaps wholly inaccurate."

The trial judge ordered that no reference be made during closing arguments to the documents, and that the defendants not "chid[e] the government for not having made good on representations they were going to make

about the Cayman Islands other than the evidence that is in evidence." Jackson could argue, however, that there was no connection between himself and any money in the Islands. Fletcher's counsel informed the trial judge that he intended to argue that there is no indication as to the whereabouts of the monies received from Dillon. In response, the trial judge stated: "It would seem to me you make your arguments and able counsel for the government can respond." In closing, Jackson argued that there was no evidence of a "payoff" from Fletcher, and that there was no evidence to show where the monies allegedly received by Fletcher from Dillon went. Hence, he suggested that the jury may infer that Fletcher never received these monies. In his rebuttal closing, the prosecutor stated:

> . And there has been all sorts of claims by [Fletcher's counsel] of why can't the government find the $40,000 or the $80,000, etc., etc. and ladies and gentlemen, I'm going to deal with that very quickly. I suggest to you the reason for that is that, Mr. Jackson told you, they are on an airplane to the Cayman Islands a couple of days later. You know from Mr. Simpson's testimony about the purpose people put money in the Cayman Islands: The difficulty of law enforcement authorities being able to find out about it. And I suggest to you that is the answer as to where the money is, or went.

The question presented is whether the prosecutor's remarks constitute error, and if so, given the lack of objection at trial, whether they amount to "plain error."

In view of the broad discretion of the trial judge in regulating cross-examination, no error was committed in the cross-examination of Jackson. In light of Dillon's prior testimony on payments to Jackson and Fletcher, Jackson's direct testimony about trips to the Islands to invest in real estate, his statement concerning his presence with Fletcher in banks on the Islands, and the

prosecutor's information about Fletcher's account, the questions were based on a "well reasoned suspicion," and do not amount to an "improbable flight of fancy." *United States v. Pugh*, 436 F.2d 222, 225 (D.C. Cir. 1970); *see also United States v. Bent*, 707 F.2d 1190, 1194 (11th Cir. 1983) (where defendant implied that prior trips into the United States were made for legitimate purpose, it was proper to cross-examine concerning alleged past involvement in drug smuggling), *cert. denied*, 466 U.S. 960 (1984).

Turning to the issue of the closing remarks, it has been established that a prosecutor should not make "statements of fact to the jury not supported by proper evidence introduced during trial." *Gaither v. United States*, 413 F.2d 1061, 1079 (D.C. Cir. 1969). The prosecutor's remarks were error to the extent that they overstated Simpson's testimony as to the reasons bank accounts in the Islands are opened, and to the extent that they suggested funds were hidden in the Islands. This, however, does not terminate the inquiry, since a reviewing court must decide whether the improper remarks caused substantial prejudice to the defendant, *United States v. Monaghan*, 741 F.2d 1434, 1443 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1085 (1985); *United States v. Kim*, 595 F.2d 755, 768 (D.C. Cir. 1979), in light of the severity of the misconduct, the measures adopted to cure the misconduct, and the certainty of conviction absent the improper remarks. *Monaghan*, 741 F.2d at 1443; *Gaither*, 413 F.2d at 1079. Evaluating the claim of plain error "against the entire record," *Young*, 470 U.S. at 16, we find that the error in this case did not "undermine the fundamental fairness of the trial and contribute to a miscarriage of justice." *Id.*

The offending statements were confined to the summation, *United States v. Modica*, 663 F.2d 1173, 1181 (2d Cir. 1981), *cert. denied*, 456 U.S. 989 (1982), and consisted only of "two remarks made by the prosecutor dur-

ing the course of his rather lengthy closing argument to the jury." *Donnelly v. DeChristoforo*, 416 U.S. 637, 640 (1974); *see also United States v. Jordan*, 810 F.2d 262, 265 (D.C. Cir.) (improper remark consisted of one phrase out of 215-line opening statement), *cert. denied*, 107 S. Ct. 1963 (1987). The remarks were not the product of an improper motive on the part of the prosecutor to excite the prejudices of the jury, *Monaghan*, 741 F.2d at 1442 n.33, and seemed to be a response to defense counsel's suggestions that there was no trace of the payments made by Dillon. In addition, we agree with the trial judge that the remarks were not directed to the central issues in the case: the participation of Perholtz and Jackson in racketeering acts including bribery and mail fraud in connection with the Postal Service's ATAP and FLSA procurements and the Small Business Administration's procurements, and the participation of all appellants in various acts of mail fraud in connection with the SBA's communications procurements.

Although the defendants did not object to the prosecutor's remarks, and did not request curative instructions, the trial court, nevertheless, did charge the jury that arguments of counsel are not evidence. The Supreme Court has noted that such an instruction may be considered in evaluating the extent to which the fairness of a trial has been affected. *See Darden v. Wainwright*, 477 U.S. 187, ——, 106 S. Ct. 2464, 2472 (1986); *see also United States v. Powell*, 469 U.S. 57, 66 (1984) (jurors expected to obey oath to follow law as charged). Courts have often emphasized the curative power of a trial court's instructions. *See United States v. Polizzi*, 801 F.2d 1543, 1558 (9th Cir. 1986); *United States v. Rojas*, 731 F.2d 707, 710 (11th Cir. 1984); *United States v. Jackson*, 627 F.2d 1198, 1213 (D.C. Cir. 1980) (citing *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 367 (1963)); *Kim*, 595 F.2d at 768; *United States v. Handly*, 591

F.2d 1125, 1131 (5th Cir. 1979). *But cf. United States v. Daniels*, 770 F.2d 1111, 1118 (D.C. Cir. 1985) (quoting *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring)); *Modica*, 663 F.2d at 1182; *Gaither*, 413 F.2d at 1079. Indeed, one member of this court has flatly declared: "it is the law, pure and simple, that jury instructions can sufficiently protect a defendant's interest in being free from undue prejudice." *Daniels*, 770 F.2d at 1120 (Starr, J., concurring) (citing *Spencer v. Texas*, 385 U.S. 554, 561 (1967)).

The conclusion that this case does not present the "exceptional circumstance[]," *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940), of a "trial infected with error so 'plain' [that] the trial judge and prosecutor were derelict in countenancing it," *United States v. Frady*, 456 U.S. 152, 163 (1982), is bolstered by the existence of a strong case against the defendants. Suffice it to state that the evidence demonstrated that Jackson accepted a bribe in connection with his substantial efforts to direct the award of the ATAP contract to Essex, that he also received payments for both his roles in the ATAP and SBA procurements via Computer Consultants International, and that he received cash, gold, and "rent" payments on a Florida condominium. As for Fletcher, the evidence demonstrated, *inter alia*, that he was aware of the use of Computer Consultants as a conduit for the payment of kickbacks, and that he, like Jackson, received payments for his role in the SBA procurements scheme in the form of cash, gold, and "rent" payments.

From its examination of the record, the court has concluded that the prosecutor's remarks at issue did not cause substantial prejudice to the defendants, and that, under the circumstances of this case, any possible prejudice was cured by the trial judge's instructions that arguments of counsel are not evidence. Hence, there was no "plain error."

F. Instructions on Enterprise Distinct from Pattern

Appellants argue that the district court plainly erred in failing to instruct the jury that the enterprise must be separate from the pattern of racketeering activity. As appellants apparently did not raise this claim below, we will not reverse unless the error is plain. *See, e.g., United States v. DeBango*, 780 F.2d 81, 84 (D.C. Cir. 1986); *United States v. Lemire*, 720 F.2d 1327, 1343 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984). As the record is ambiguous on whether appellants made this claim to the district court, *see United States v. Perholtz*, Crim. No. 85-255, Memorandum and Order (D.D.C. Feb. 18, 1986), J.A. at 103, we emphasize that we would reject appellants' argument even if they did adequately preserve it.

Appellants primarily rely on *United States v. Turkette*, 452 U.S. 576 (1981), which held that RICO encompasses both legitimate and illegitimate enterprises. One of the reasons given by the appellate court that reached the opposite conclusion was that inclusion of illegitimate enterprises would eviscerate the distinction between the enterprise and the pattern of racketeering. The Supreme Court rejected this argument:

> In order to secure a conviction under RICO, the Government must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. 18 U.S.C. § 1961(1) (1976 ed., Supp. III). The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While *the proof used*

> *to establish these separate elements may* in particular cases *coalesce*, proof of one does not necessarily establish the other. The "enterprise" is not the "pattern of racketeering activity"; it is an *entity separate and apart from the pattern* of activity in which it engages.

452 U.S. at 583 (emphasis added). As we read this passage, the government is required to prove that the associates are bound together by some form of organization so that they function as a continuing unit, and thus constitute an "enterprise." Although organization is not *necessarily* established by proof of a pattern of racketeering activity, the existence of the enterprise may be inferred from proof of the pattern.

The enterprise is established by (1) a common purpose among the participants, (2) organization, and (3) continuity. The second element—"organization" or "structure"—is the most difficult to show. Appellants urge us to adopt the view of some circuits that the structure must be proven by evidence other than that of the pattern of racketeering:

> [An association-in-fact] encompass[es] only an association having an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal that has an existence that can be defined apart from the commission of the predicate acts constituting the "pattern of racketeering activity."

United States v. Anderson, 626 F.2d 1358, 1372 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981). *See also United States v. Neapolitan*, 791 F.2d 489, 500 (7th Cir.), *cert. denied*, 107 S. Ct. 422 (1986) (quoting *Anderson*); *United States v. Tillett*, 763 F.2d 628, 631 (4th Cir. 1985); *United States v. Riccobene*, 709 F.2d 214, 223-24 (3d Cir.), *cert. denied*, 464 U.S. 849 (1983); *United States v. Lemm*, 680 F.2d 1193, 1198 (8th Cir. 1982), *cert. denied*, 459 U.S. 1110 (1983).

Most of these cases, *e.g.*, *Lemm*, 680 F.2d at 1198, interpret the following language from *Turkette*: "The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages." 452 U.S. at 583. To the extent these courts have held that the enterprise is not *equivalent* to the pattern of racketeering, we are in accord. The same group of individuals who repeatedly commit predicate offenses do not necessarily comprise an enterprise. An extra ingredient is required: organization. To the extent, however, these cases suggest that the organization cannot be inferred from the pattern (or even more, that the organization cannot exist unless it does something other than commit predicate acts), we cannot agree. *Turkette* specifically recognizes that the proof of the enterprise may "coalesce" with the proof of the pattern, i.e., that the different conclusions may be inferred from proof of the same predicate acts. 442 U.S. at 583. The more extreme conclusion, that the enterprise must have non-criminal manifestations, was rejected by the precise holding of *Turkette*.

Those courts imposing a strict separateness requirement appear to be concerned that RICO could be expanded to encompass even a "sporadic and temporary criminal alliance." *Lemm*, 680 F.2d at 1201. They need not be, however, if proper attention is given to the organization and continuity requirements for the enterprise, on the one hand, and the "continuity plus relationship" requirement for the pattern of racketeering, on the other hand. *See Sedima*, 473 U.S. at 496 n.14 (quoting S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969)).

We therefore follow those courts that have held that the government satisfies its burden if it proves the existence of the enterprise and of the pattern, and refuse to require the government to prove each by separate evidence. *See United States v. Mazzei*, 700 F.2d 85, 89 (2d Cir.), *cert. denied*, 461 U.S. 945 (1983); *see also United States v.*

Williams, 809 F.2d 1072, 1093-94, *modified in different part*, 828 F.2d 1 (5th Cir.), *cert. denied*, 108 S. Ct. 228 (1987); *United States v. Qaoud*, 777 F.2d 1105, 1115 (6th Cir. 1985) (citing *Mazzei*), *cert. denied*, 475 U.S. 1098 (1986); *United States v. Hewes*, 729 F.2d 1302, 1310-11 (11th Cir. 1984), *cert. denied*, 469 U.S. 1110 (1984); *United States v. DeRosa*, 670 F.2d 889, 895-96 (9th Cir.), *cert. denied*, 459 U.S. 993 (1982).

Judge Gesell instructed the jury as follows:

> An enterprise may be a group of people, partnerships and corporations that become associated together in an organized continuing unit for a common purpose of engaging in a legal or illegal course of conduct.
>
> The indictment charges that the enterprise in this case was a group of individuals, partnerships and corporations associated for the common purpose of unjustly enriching themselves from the proceeds of government contracts and subcontracts. . . .
>
> . . . .
>
> It is not necessary that the enterprise, if it existed, have any particular or formal structure but it must have sufficient organization that its members function and operated together in a coordinated manner in order to carry out the common purpose alleged.

J.A. at 266-67. This instruction properly defined the elements of an association-in-fact. The instruction required the jury to find (1) common purpose, (2) organization, and (3) continuity.

G. Instruction on Membership of Enterprise

Appellants argue that Judge Gesell erroneously instructed the jury as follows:

> The membership need not include every one of the entities I have listed as long as you find that it was substantially the same as the enterprise described.

> The membership of the enterprise may change over time but the enterprise must have a continuous organization, purpose and core of personnel that remain essentially unchanged during the period charged in the indictment.

J.A. at 267. Appellant Jackson argues that this instruction "erroneously relieved the Government of its duty to conform the proof to the indictment"; in particular, that it discharged the government from the burden of proving that the enterprise existed during the STARS, PRISM, and FIRM projects. Brief for Jackson at 39. Appellants did not object to this instruction below, and we therefore review under the plain-error standard. *See supra* at 36.

With respect to Jackson's first objection, substantial identity between proof and indictment is sufficient; minor variances are permitted. *See supra* at 22-23.

The enterprise is proven by common purpose, organization, and continuity. Therefore, it is not essential that each and every person named in the indictment be proven to be a part of the enterprise. The enterprise may exist even if its membership changes over time, *e.g.*, *Hewes*, 729 F.2d at 1316-17, or if certain defendants are found by the jury not to have been members at any time.

The evidence concerning STARS, PRISM, and FIRM is another matter. We do not perceive how the instruction just quoted directly relieved the government of its burden of proving the existence of the enterprise while these schemes were in progress. On the contrary, the evidence relating to STARS, PRISM, and FIRM tended to establish this very fact—the continuity of the enterprise. *See supra* at 21-22. As the government had dismissed count I, it was not obliged to prove beyond a reasonable doubt that the enterprise existed while STARS, PRISM, and FIRM were ongoing. The government was only required to show that this evidence was probative of an element it was required to prove: the existence of a continuous enterprise.

H. Mail Fraud

1. *Statute of Limitations*

To sustain the convictions for violation of the mail fraud statute, 18 U.S.C. § 1341 (1982),[19] this court must determine that the jury, properly charged, could find that the defendants caused the mails to be used for the purpose of executing a scheme to defraud. *See United States v. Sampson*, 371 U.S. 75, 76 (1962); *Pereira v. United States*, 347 U.S. 1, 8 (1954). Counts III through V of the indictment, *inter alia*, charge defendants Perholtz and Jackson, together with Gentile, with causing the mailing of documents, in September and December of 1980, which authorized the payment of funds to Essex in connection with a bid-rigging scheme involving ATAP. Defendant Perholtz contends that the five-year statute of limitations specified in 18 U.S.C. § 3282 (1982)[20] bars his prosecution for mail fraud. He argues that the limitations period is calculated from the date that the offense charged is complete, namely, the date of

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[19] Section 1341 provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

[20] Section 3282 provides:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

consummation of the agreement among the parties to pay bribes in return for the awarding of the ATAP contracts. Since, in his view, the undisputed evidence adduced at trial reveals that this agreement occurred prior to August 6, 1980, exactly five years prior to the date the indictment was returned, the mail fraud prosecution is jurisdictionally precluded.

Since mailings that clearly furthered the scheme to defraud occurred within five years of the date of the indictment, the mail fraud prosecution is not time barred. *See United States v. Brewer*, 807 F.2d 895, 897-98 (11th Cir.) (citing *United States v. Georgalis*, 631 F.2d 1199, 1204-06 (5th Cir. Unit B 1980)), *cert. denied*, 107 S. Ct. 1909 (1987); *see also United States v. A-A-A Elec. Co.*, 788 F.2d 242, 244-45 (4th Cir. 1986) (in prosecution for bid-rigging conspiracy in violation of Sherman Act, section 3282 limitations period does not begin to run until final payments received and payoffs distributed among co-conspirators). In *United States v. Lane*, 474 U.S. 438, 451-53 (1986), the Supreme Court affirmed section 1341 convictions involving arson as part of a scheme to defraud insurance companies. In a statement that is applicable here, the Court held that a "jury could properly find the scheme, at the earliest, was not completed until receipt of the last payment." *Lane*, 474 U.S. at 452. Here, also, the jury could properly find that the instant scheme had not been completed prior to the mailing, from Washington, D.C. to New York City, of the authorization of payment for Essex.

Absent a plan to "lull the victims into a false sense of security," *United States v. Maze*, 414 U.S. 395, 403 (1974), mailings occurring after a scheme has "reached fruition," *Kann v. United States*, 323 U.S. 88, 94 (1944), generally are not deemed to be in furtherance of the scheme. The case at bar, however, must be distinguished from those cases in which the mailings occurred after the party perpetrating the fraud has received the goods

or services sought. *See Maze*, 414 U.S. at 402 (fraud completed when defendant used stolen credit card to obtain food and lodging); *Parr v. United States*, 363 U.S. 370, 393 (1960) (perpetrators of fraud obtained products and services prior to the billing by the merchants); *Kann*, 323 U.S. at 95 (conviction under materially identical predecessor to section 1341 reversed where defendants had received fraudulently obtained monies prior to the mailings). Here, the use of the mails was a highly probable means by which Essex, and ultimately the defendants, would "acquire dominion," *Maze*, 414 U.S. at 401, over the funds that represented the fruits of the plan to defraud. The mailing alleged in the indictment, therefore, was "incident to an essential part of [a] scheme," *Pereira*, 347 U.S. at 8, involving the bribery of Postal Service officials, which was designed to collect monies by depriving the Postal Service of the financial benefits of honest procurements. On the facts presented, the mail fraud prosecution was timely commenced, and was not barred.

2. *The Mail Fraud Statute Proscribes Appellants' Conduct*

In the wake of the decision in *McNally v. United States*, 107 S. Ct. 2875 (1987), appellants contend that the conduct for which they were prosecuted is not encompassed by section 1341. We reject appellants' argument and affirm all the mail fraud convictions.

In *McNally*, state officers required an insurance agency, as a condition of remaining the state's insurance agent, to "kickback" to entities controlled by those officers a portion of the commissions received from insurance companies doing business with the state. *McNally*, 107 S. Ct. at 2877. The indictment, *inter alia*, charged the defendants with participation in a scheme to defraud the citizens of the state of their right to honest and impartial government by virtue of the failure of the state

officers to disclose the fact of their financial gain to other persons in state government whose actions could have been affected by the disclosure. *Id.* at 2882 n.9. The Court reversed the mail fraud convictions, holding that section 1341 is limited to the protection of property rights and does not protect the "intangible right of the citizenry to good government." *Id.* at 2879. The Court noted that there was no charge that the state itself was defrauded of any property or that it was deprived of control over the expenditure of its funds. *Id.* at 2882. Furthermore, despite a charge in the indictment that the defendants had obtained property by means of false representations to the insurance agent, the jury was not required to make such a finding. *Id.* Absent a charge that state law prohibited profiteering by a state officer acting in an official capacity, or that state law required disclosure of such profiteering, the Court was unwilling to conclude that such activity defrauded the state and, therefore. that it is proscribed by federal law. *Id.* at 2882 n.9.

For the reasons stated in our opinion concerning appellants' motions for release pending appeal, *United States v. Perholtz*, 836 F.2d 556, 558-60 (D.C. Cir. 1988), we conclude that *McNally* does not require reversal of appellants' convictions in connection with the SBA scheme. We further conclude that the ATAP convictions also must be affirmed.

We base our conclusion concerning the ATAP scheme on *Carpenter v. United States*, 108 S. Ct. 316 (1987). There, the Court upheld the convictions for mail and wire fraud of a Wall Street Journal ("Journal") reporter and others who traded stock in anticipation of the content of the Journal's "Heard on the Street" column. Although *McNally* had foreclosed prosecutions based on "intangible rights," it did not limit mail fraud to the deprivation of tangible *property*. The Journal had a property interest in its confidential business information: the timing and content of its column. 108 S. Ct. at 320.

It was immaterial that the appellants had not interfered with the Journal's use of the information; the Journal owned the information, and it had the exclusive right to decide how to use it. *Id.* at 321. As the reporter obtained the information in the course of his employment, he was bound not to use it in a manner not authorized by the Journal:

> "a person who acquires special knowledge or information by virtue of a confidential or fiduciary relationship with another is not free to exploit that knowledge or information for his own personal benefit but must account to his principal for any profits derived therefrom."

Id. (quoting *Diamond v. Oreamuno*, 24 N.Y.2d 494, 497 (1969)).

In this case, Jackson had confidential information concerning the design specifications that the Postal Service would require for the ATAP project. He acquired this information in the course of his employment and was not entitled to use it except in the manner directed by the information's owner (the government). Jackson's theft of property consisted of his appropriation of confidential information belonging to his employer.

Without deciding whether a government employee's unauthorized use of confidential information always would constitute a mail fraud violation, we conclude that this case is governed by *Carpenter*. The Postal Service was acting in its proprietary capacity in undertaking ATAP. It sought to acquire a system for the lowest possible price and used a competitive bidding process to this end. The integrity of competitive bidding, however, depends on all potential bidders receiving the same information at the same time. By appropriating the confidential information concerning the ATAP specifications and leaking it to Perholtz, Jackson skewed the bidding process and directly impinged upon the government's economic interests.

Although this case was not presented to the jury under *Carpenter*'s theft of confidential business information rationale, we have little difficulty affirming on this basis. The instructions required the jury to find an enterprise whose purpose was to enrich itself unjustly "from the proceeds of government contracts and sub-contracts for computer services and equipment which had been and would be obtained by means of bribery, fraud and *circumvention of government contracting procedures.*" J.A. at 266 (emphasis added). Thus, the factual predicate for the jury's verdict necessarily implies that it found that Jackson stole confidential information in violation of the mail fraud statute as interpreted in *Carpenter*. *Cf. United States v. Jacobs*, 475 F.2d 270, 283 (2d Cir.) (upholding conviction on alternate basis because jury necessarily found every element required to support conviction), *cert. denied*, 414 U.S. 821 (1973).

I. The Forfeiture Verdict Should Not Be Reversed

Defendant Perholtz argues that separate proceedings are constitutionally required to determine guilt and to determine which assets are subject to forfeiture. In effect, he contends that the only way that he could defend against the possible forfeiture of a particular asset was to concede guilt by discussing the origin and ownership of that asset. Perholtz has cited no authority for the proposition that the proceedings in question were violative of due process, and the court holds that the trial judge's decision not to bifurcate the proceedings was within the proper exercise of his discretion.

Prior to trial, Perholtz requested separate proceedings although appellant Jackson sought a unitary proceeding. The trial judge denied Perholtz's request, but instructed the jurors that they should not consider the forfeiture question unless they first found the defendant guilty of the RICO offenses. This instruction was specifically repeated as to both Perholtz and Jackson. Perholtz ap-

parently offered no objection to this instruction while the charge was formulated or after it was delivered.

The Supreme Court has held, albeit in the context of a capital case, that a unitary proceeding does not violate the right to due process. *McGautha v. California*, 402 U.S. 183 (1971), *vacated in part on other grounds*, 408 U.S. 941-42 (1972). The Court concluded that the "policies of the privilege against compelled self-incrimination are not offended when a defendant in a capital case yields to the pressure to testify on the issue of punishment at the risk of damaging his case on guilt." *Id.* at 217. There is no requirement that a defendant be permitted "to speak to the jury free from any adverse consequences on the issue of guilt." *Id.* at 220. Since "[f]orfeiture under RICO is an in personam penalty designed as part of the punishment for the criminal offense committed," *United States v. Kravitz*, 738 F.2d 102, 106 (3d Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985); *United States v. Huber*, 603 F.2d 387, 396 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980), and the Supreme Court has recognized that the same fundamental issue is involved in all sentencing proceedings, both capital and noncapital, *see Spaziano v. Florida*, 468 U.S. 447, 459 (1984), we cannot agree with appellants' assertion that the Constitution requires bifurcated proceedings.

No showing has been made that Perholtz suffered prejudice as a result of the trial judge's decision not to bifurcate the proceedings. The trial judge properly employed the special verdict procedure required by Federal Rule of Criminal Procedure 31(e).[21] His instructions

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[21] Rule 31(e) provides:

> (e) Criminal Forfeiture. If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any.

made clear the sequential nature of the inquiry into the questions of guilt and forfeiture. Moreover, we note that the jury did not vote to forfeit all the property listed on the special verdict form. Admittedly, the order decreeing a unitary proceeding does not reveal the trial judge's reasoning. The trial judge, however, could properly determine that, by allowing presentation of often related evidence on guilt and punishment at the same time, protracted proceedings would not become even lengthier, thereby serving the salutary purpose of promoting the efficient use of judicial resources.

We are aware of *United States v. Cauble*, 706 F.2d 1322, 1348 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984), in which the court stated that "the forfeiture issue should be withheld from [the jurors] until after they have returned a general verdict. At that time the trial judge can instruct the jurors fully about forfeiture and submit the special verdict to them." The statement may be interpreted as advocating separate instructions, but not necessarily separate proceedings, on the issues of guilt and forfeiture. In any event, we decline to adopt a blanket rule allowing instructions on forfeiture only after the verdict on guilt has been returned. Nor are we willing to follow the court in *United States v. Sandini*, 816 F.2d 869 (3d Cir. 1987), which has invoked its "supervisory powers to require that, in the future, in personam forfeiture proceedings, including evidence on that issue, be bifurcated from the guilt phase of criminal trials." *Id.* at 874.

Prior to its amendment in 1984,[22] RICO provided two bases upon which property could be declared forfeit:

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[22] By virtue of the Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, Title II, § 302, 98 Stat. 2040 (1984), the following paragraph was added to section 1963(a):

> (3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

> (a) Whoever violates any provision of section 1962 of this chapter . . . shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

18 U.S.C. § 1963(a) (1982). The trial judge instructed the jury separately on two groups of assets sought by the government. The trial judge charged, in accordance with the indictment, that any asset in the first group, which consisted largely of various consulting fees and royalty payments received by Perholtz, could be declared forfeit if found beyond a reasonable doubt to be Perholtz's property, and either represented the proceeds of a charged racketeering offense or was used to afford Perholtz a source of influence over the enterprise. The assets in the second group included Perholtz's ownership interest in ATL, his interest in ATL's corporate address, his rights in all patents, copyrights, and licensing agreements pertaining to the ATAP software, and the contents of various bank accounts in the name of ATL or Perholtz ("Calvert Group" accounts). The trial judge explained that these assets could be declared forfeit if found beyond a reasonable doubt to be Perholtz's property, and were used to afford Perholtz a source of influence over the enterprise.

Perholtz also challenges sufficiency of the evidence supporting the verdict of forfeiture. In reference to the first group of assets, without elaboration or support, he states that the evidence was insufficient to sustain forfeiture under either theory charged by the trial judge. Perholtz, however, appears mainly to contest the forfeiture of the second group of assets. Specifically, he contests the forfeiture of the Calvert Group accounts. We need not address his contention that these funds did not

represent the proceeds of racketeering activities, since the trial judge charged the jury under the forfeiture prong contained in section 1963(a)(2). Offering little factual support, Perholtz further asserts that "there was no evidence adduced to show that the funds were used to afford a source of influence over the enterprise described in the RICO offense." Perholtz's arguments on this issue are devoid of merit, and we hold that both groups of assets were properly forfeited.

"The legislative history clearly demonstrates that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello v. United States*, 464 U.S. 16, 26 (1983); *United States v. Turkette*, 452 U.S. 576, 588-89 (1981) (RICO enacted as part of legislation designed to combat the pervasive organized crime problem). Not only does the statute contemplate the forfeiture of the right to profits and proceeds derived from racketeering, *see Russello*, 464 U.S. at 22, but in addition, Congress sought to divest a defendant from his ownership interest in an organization he had conducted through a pattern of racketeering activity. *United States v. Rubin*, 559 F.2d 975, 992 (5th Cir. 1977), *vacated and remanded on other grounds*, 439 U.S. 810 (1978), *aff'd in part, rev'd and remanded in part*, 591 F.2d 278 (5th Cir.), *cert. denied*, 444 U.S. 864 (1979). To this end, forfeiture is mandatory if the jury has determined that the statutory criteria have been met. *See United States v. Godoy*, 678 F.2d 84, 88 (9th Cir. 1982), *cert. denied*, 464 U.S. 959 (1983); *United States v. L'Hoste*, 609 F.2d 796, 812-13 (5th Cir.) *cert. denied*, 449 U.S. 833 (1980).

The trial evidence clearly demonstrated that the first group of assets were derived from payoffs and kickbacks from the various entities and individuals comprising the racketeering enterprise. As to the second group of assets, there is sufficient evidence to link Perholtz's conduct to the racketeering activity and to the enterprise charged in the

indictment. *See Cauble*, 706 F.2d at 1348; *Huber*, 603 F.2d at 396-97. In sum, it was demonstrated that ATL, controlled by Perholtz, entered into bogus agreements with various corporations charged in the indictment as part of the association-in-fact enterprise. Perholtz used ATL as a principal vehicle through which payments were made to, and received from, other participants in the illicit enterprise. Hence, we hold that Perholtz's assets, including Perholtz's ownership in ATL, ATL's corporate assets, and the Calvert Group accounts, were properly forfeited.

III. Conclusion

The convictions of appellants Perholtz, Jackson, and Fletcher are affirmed in all respects.

So ordered.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-3032

UNITED STATES OF AMERICA

v.

RONALD J. PERHOLTZ, APPELLANT

No. 86-3033

UNITED STATES OF AMERICA

v.

FRANKLIN W. JACKSON

No. 86-3034

UNITED STATES OF AMERICA

v.

GREGORY W. FLETCHER

On Appellants' Motions for Release Pending Appeal

(D.C. Criminal Nos. 85-00255-01,
85-00255-02, 85-00255-03)

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Order Filed October 19, 1987

Opinion Filed January 8, 1988

Steven Schaars, with whom *William L. Gardner* and *Leigh Manasvit* were on the motion for appellant Ronald J. Perholtz.

Whitney Debevoise, appointed by this Court, with whom *William L. Gardner*, was on the motion for appellant Franklin W. Jackson.

William L. Gardner, appointed by this Court, was on the motion for appellant Gregory W. Fletcher.

Katherine A. Worthington, Assistant United States Attorney, with whom *Brian M. Murtagh*, Assistant United States Attorney, *Joseph B. Valder*, Assistant United States Attorney, *Michael W. Farrell*, Assistant United States Attorney and *Joseph E. diGenova*, United States Attorney, were on the motion for United States.

Before: BORK and BUCKLEY, *Circuit Judges*, and EDWARD D. RE*, *Chief Judge*, United States Court of International Trade.

PER CURIAM: Appellants, Perholtz, Jackson and Fletcher, moved for release pending appeal pursuant to 18 U.S.C. § 3143(b) (Supp. III 1985) and Fed. R. App. P. 9(b). After considering appellants' arguments, we denied their motions by order filed October 19, 1987. This opinion states our rationale.

Section 3143(b), which was enacted by the Bail Reform Act of 1984, Pub. L. No. 98-473, § 203(a), 98 Stat. 1976, 1981, provides that "a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal" shall be detained unless the court finds "that the person is not likely to flee or pose a danger to the safety of any other person

* Sitting by designation pursuant to 28 U.S.C. § 293(a).

or the community if released" and "that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal." 18 U.S.C. § 3143(b). In this case, the parties agree that the defendants are not likely to flee and do not pose a danger, and that the appeal is not for the purpose of delay. The point of disagreement on this motion is whether defendants' appeal, in light of *McNally* v. *United States*, 107 S. Ct. 2875 (1987), which was decided after oral argument in this case, "raises a substantial question of law or fact likely to result in reversal." 18 U.S.C. § 3143(b). That provision has not been interpreted in a published opinion of this court. Because we conclude that the application of *McNally* to this case does not "raise a substantial question" likely to result in reversal of all counts for which appellants received prison terms, we deny appellants' motions.

I.

In the present case, we must determine whether appellants' appeal "raises a substantial question of law or fact likely to result in reversal." 18 U.S.C. § 3143(b). We forego a detailed discussion of the provision's legislative history and possible constructions because our sister circuits have paved the way for us and we need do little more than signal our agreement. All of the circuits that have construed the provision (the Fourth Circuit is the only other circuit that has not construed it) agree that the provision requires a two-part inquiry: (1) Does the appeal raise a substantial question? (2) If so, would the resolution of that question in the defendant's favor be likely to lead to reversal? *See, e.g., United States* v. *Bayko*, 774 F.2d 516, 522-23 (1st Cir. 1985); *United States* v. *Handy*, 761 F.2d 1279, 1280-81 (9th Cir. 1985); *United States* v. *Giancola*, 754 F.2d 898, 900 (11th Cir. 1985), *cert. denied*, 107 S. Ct. 669 (1986); *United States* v. *Miller*, 753 F.2d 19, 23 (3d Cir. 1985). Only the question of substantiality is at issue in this motion because if

McNally does raise a substantial question as to the validity of appellants' convictions, and if that question is resolved in appellants' favor, then, of course, those convictions must be reversed.

Two differing standards for determining substantiality have been adopted in the various circuits. Under one standard a substantial question is one that is "fairly debatable," "fairly doubtful," or "one of more substance than would be necessary to a finding that it was not frivolous."[1] Under the other standard a substantial question is "a 'close' question or one that very well could be decided the other way."[2] We adopt the latter, more demanding standard, because it appears better to accord with the expressed congressional intent to increase the required showing on the part of the defendant. The law has shifted from a presumption of release to a presumption of valid conviction. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 27 (1983), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3210.

Thus, we must decide whether the validity of defendants' convictions after *McNally* is a close question or one that very well could be decided the other way.

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[1] United States v. Handy, 761 F.2d 1279, 1283 (9th Cir. 1985); *see also* United States v. Messerlian, 793 F.2d 94, 96 (3d Cir. 1986) (applying "fairly debatable" standard).

[2] *See* United States v. Bayko, 774 F.2d 516, 523 (1st Cir. 1985); United States v. Randell, 761 F.2d 122, 125 (2d Cir.), *cert. denied*, 474 U.S. 1008 (1985); United States v. Valera-Elizondo, 761 F.2d 1020, 1024 (5th Cir. 1985); United States v. Pollard, 778 F.2d 1177, 1182 (6th Cir. 1985); United States v. Shoffner, 791 F.2d 586, 589 (7th Cir. 1986); United States v. Powell, 761 F.2d 1227, 1231-32 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1947 (1986); United States v. Affleck, 765 F.2d 944, 952 (10th Cir. 1985); United States v. Giancola, 754 F.2d 898, 901 (11th Cir. 1985), *cert. denied*, 107 S. Ct. 669 (1986).

II.

Only a brief description of the appellants' convictions and the underlying "schemes to defraud" will be presented here. A more complete description of the case will be found in the forthcoming opinion of this court on the merits of the appeal. Appellants' convictions arise from their activities relating to the development of a computerized payroll system, the Automated Time and Attendance Procedures project ("ATAP"), for the United States Postal Service, and the development of a data communications system for the Small Business Administration ("SBA"). Appellants Perholtz and Jackson were convicted on one RICO count[3] based on one predicate act of bribery, thirty-four predicate acts of mail fraud relating to the ATAP project and one predicate act of mail fraud relating to the SBA system. Appellants Perholtz and Jackson were also convicted on three counts of mail fraud relating to the ATAP project. Appellants Perholtz, Jackson and Fletcher were convicted on ten counts of mail fraud relating to the SBA system.

Perholtz was sentenced to a ten-year prison term on the RICO count. He was sentenced to five-year terms on each of the three ATAP related mail fraud counts—the sentence on each of those three counts to run concurrently with the other two and concurrently with the ten-year sentence on the RICO count. He was sentenced to five-year terms on each of the ten SBA related mail fraud counts—each of those ten sentences to run concurrently with each other, concurrently with the ten-year RICO term and consecutive to the five-year sentences imposed on the ATAP related mail fraud counts.

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[3] "RICO" is the popular name for the chapter of the United States Code entitled "Racketeer Influenced and Corrupt Organizations." 18 U.S.C. §§ 1961-1968 (1982 & Supp. III 1985). Perholtz and Jackson were convicted of violating 18 U.S.C. § 1962(c) (1982).

Jackson was sentenced to a seven-year prison term on the RICO count. He was sentenced to two-year terms on each of the three ATAP related mail fraud counts—the sentences on each of those three counts to run concurrently with the other two and concurrently with the seven-year sentence on the RICO count. He was sentenced to five-year terms on each of the ten SBA related mail fraud counts—each of those sentences to run concurrently with each other, concurrently with the seven-year RICO term and consecutive to the two-year sentences imposed on the ATAP related mail fraud counts.

Fletcher was sentenced to concurrent four-year prison terms on each of the ten SBA related mail fraud counts.

Appellants appealed their convictions. Their cases were consolidated and argued before this court on May 15, 1987. The Supreme Court decided *McNally* v. *United States*, 107 S.Ct. 2875, on June 24, 1987, and the parties submitted supplemental briefs on the possible relevance of *McNally* to this case. On July 15, 1987, appellants applied to the district court for release pending appeal pursuant to 18 U.S.C. § 3143(b) (Supp. III 1985) and Fed. R. App. P. 9(b). The district court, "unable to conclude that *McNally* ha[d] any significant effect on the merits of the jury's decision," refused release by order dated July 30, 1987. Appellants then moved for release in this court.

Appellants contend that their mail fraud convictions must be reversed because, like the defendants in *McNally*, they were convicted for conduct not within the reach of the mail fraud statute, 18 U.S.C. § 1341 (1982). If all of the mail fraud convictions were to be reversed, then the RICO convictions, which are based on only one predicate act other than acts of mail fraud, would also have to be reversed.[4] If we determine, however, that *McNally*

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[4] Perholtz and Jackson were convicted of participating in the affairs of an enterprise "through a pattern of racketeer-

raises no substantial question as to the validity of the SBA related mail fraud convictions, then we need not determine whether a substantial question is raised as to the validity of the ATAP related convictions on this motion. All three appellants received prison terms on SBA related mail fraud counts, and they cannot be released unless the appeal raises a substantial question likely to result in reversal of all counts on which imprisonment is imposed. *See, e.g., United States* v. *Bilanzich*, 771 F.2d 292, 298 & n.6 (7th Cir. 1985). Because we find that *McNally* does not raise a substantial question with respect to the SBA related convictions we do not reach appellants' other convictions on this motion.

III.

McNally v. *United States*, 107 S. Ct. 2875 (1987), brought an end to the "intangible rights" theory of mail fraud prosecution by holding that the mail fraud statute, 18 U.S.C. § 1341, is "limited in scope to the protection of property rights." *McNally*, 107 S. Ct. at 2881. The intangible rights theory had been used by prosecutors to win mail fraud convictions where defendants, who could be characterized as fiduciaries, were found to have deprived their beneficiaries of the honest and faithful services due them. This theory was often used against persons involved in political corruption that could not otherwise be reached by federal prosecutors. The typical case against a public official would charge the official with having deprived the citizenry of the benefit of his faithful and honest services. An intangible rights prosecution could be based on the nondisclosure of a conflict of interest, and required no proof of any loss or threatened loss to the beneficiary—other than the deprivation of faithful and honest service. Although the intangible

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ing activity." 18 U.S.C. § 1962(c) (1982). Such a pattern "requires at least two acts of racketeering activity." *Id.* § 1961(5).

rights doctrine had been embraced by prosecutors and the courts of appeals, it was severely criticized by commentators and some judges as effecting a radical expansion of a criminal statute "beyond any colorable claim of Congressional intent." *United States* v. *Margiotta*, 688 F.2d 108, 139 (2d Cir. 1982) (Winter, J., dissenting in part), *cert. denied*, 461 U.S. 913 (1983); *see United States* v. *Bronston*, 658 F.2d 920, 930-31 (2d Cir. 1981) (Van Graafeiland, J., dissenting), *cert. denied*, 456 U.S. 915 (1982); Coffee, *The Metastasis of Mail Fraud: The Continuing Story of the "Evolution" of a White-Collar Crime*, 21 Am. Crim. L. Rev. 1 (1983); Lynch, *RICO: The Crime of Being a Criminal* (pt. 2), 87 Colum. L. Rev. 713, 741-42 (1987).

The *McNally* case involved a scheme in which a defendant had control over selecting the insurance agency from which the state would buy certain insurance policies. The defendant selected an agency that agreed, in exchange for the state's insurance business, to pay a portion of the commissions it received, not from the state but from underwriting insurance companies, to entities in which the defendant had an interest. The defendant was convicted after a jury verdict that was based on an intangible rights theory. The Sixth Circuit affirmed, relying "on a line of decisions from the Courts of Appeals holding that the mail fraud statute proscribes schemes to defraud citizens of their intangible rights to honest and impartial government." *McNally*, 107 S. Ct. at 2879.

The Supreme Court reversed the lower court's judgment in *McNally* because the jury instructions allowed a conviction on the intangible rights theory. The Court also suggested, however, that the underlying scheme could not have led to a conviction for defrauding the state. *See* 107 S. Ct. at 2882. The *McNally* defendant selected the insurance agencies from which the state purchased its policies; he named the recipients of the pre-

miums. *McNally* was not a case in which the defendants had control over the amount paid for the insurance, or over the kind of insurance that the state was to receive for the amount paid. Had the defendants had such control, and had the jury been so charged, *McNally* would not have been an "intangible rights" case. We draw this conclusion from the Court's statements that the "commissions were not the [state's] money" and "the premium for insurance would have been paid to some agency," *McNally*, 107 S. Ct. at 2882—statements that are somewhat cryptic in light of the abbreviated statement of facts presented in the opinion. Our conclusion as to the facts is supported by the statement in petitioner Gray's brief (essentially uncontradicted by the government's brief) that "the evidence is uncontested that *no* 'public funds' were involved in the patronage scheme. . . . The government's own witness at trial, the former State Insurance Commissioner, testified that the premium for the policy was set by an out-of-state rate-making authority, and that the insurance commissions were contractually arranged between [the insurance agency] and the underwriter. Nothing [defendants] could do affected the amount of money the state paid." Reply Brief for Petitioner Gray at 8, *McNally* (No. 86-286) (citations omitted). The present case is distinguishable from *McNally* both with regard to the nature of the underlying scheme and the jury instructions.

IV.

The SBA scheme was an elaborate kickback scheme through which the defendants received unearned commissions from subcontractors of the SBA system. Were this a case in which the cost of the contract to the SBA could not have been influenced by the defendants, then it would be directly analogous to *McNally* where the Court noted that "the premium for insurance would have been paid to some agency, and what [defendants] did was

to assert control . . . over the commissions paid by the insurance company to its agent." *McNally*, 107 S. Ct. at 2882. Here defendants did more than assert control over the flow of the subcontractors' funds. Their scheme ensured that the "negotiated" cost of the subcontracts was higher than the price at which the subcontractors would have been willing to contract, and ensured that this higher cost was passed through to the SBA in its cost-plus contract with the prime contractor. The defendants' scheme caused the SBA to pay more than it need have, so it cannot be said that the cost would necessarily have been paid to some company in the sense that this was true in *McNally*. In fact, a lesser cost could have been paid to the prime contractor if the defendants had negotiated subcontracts that did not include the cost of bogus marketing agreements and other kickbacks.

V.

Nothing in the jury instructions in *McNally* required a finding that the state "was defrauded of any money or property." *McNally*, 107 S. Ct. at 2882. In this case, the jury instructions on the SBA scheme did require such a finding. While the jury was charged that it was "not necessary that the prosecutor prove all of the details alleged concerning the precise nature and purpose of the scheme," and that it was "sufficient if the proof establishes beyond a reasonable doubt that the defendant knowingly and willfully devised or aided and abetted a scheme substantially the same as the one alleged in the indictment," Joint Appendix ("J.A.") at 281, the instructions then went on to describe the SBA scheme as one "to defraud the SBA of its lawful right to conduct its business and affairs free from kickbacks, deceit, fraud, misrepresentation, theft and breaches and omissions of fiduciary and contract duties *and to obtain money by false and fraudulent pretenses and representations*." J.A. at 284 (emphasis added). Later, the trial judge repeated this same description of the scheme, in-

cluding the reference to the "obtain[ing of] money by false and fraudulent pretenses and representations." *Id.* at 291.

The trial judge also made clear that the alleged scheme was one to defraud the SBA, not the prime contractor. The jury was instructed: "[I]f you find that the proof shows only a scheme to defraud [the prime contractor] you should find the defendant not guilty." J.A. at 285.

The jury could not have regarded any scheme that did not involve tangible loss to the SBA as being "a scheme substantially the same as the one alleged in the indictment." The SBA scheme, as it is alleged in the indictment, is a kickback scheme causing tangible loss to the SBA. Indictment at 14-20, 72-81, J.A. at 15-21, 73-82. The scheme can be characterized as an "intangible rights" scheme only in the following sense: appellants, by defrauding the SBA of money through kickbacks, can be said by virtue of that very act of defrauding to be at the same time defrauding the SBA of its "lawful right to conduct [its] business and affairs free from kickbacks, trickery, deceit, craft, fraud, misrepresentation, theft and breaches and omissions of fiduciary and contract duties." Indictment at 68, J.A. at 69. It was in this sense that the indictment, in a sentence introducing the detailed description of the kickback scheme, can be said to have characterized the scheme as one involving intangible rights. That same introductory sentence went on to describe the kickback scheme as being *also*—not alternatively—one "to obtain money and property by false and fraudulent pretenses, promises and representations." *Id.* The indictment did not allege any scheme (involving fraud on the SBA) other than the kickback scheme, and it is inconceivable that the jury could have disregarded the alleged kickback scheme as a mere "detail[] . . . concerning the precise nature and purpose of the scheme." J.A. at 281 (jury charge).

If particular sentences of the jury charge are read in isolation, it appears that the jury could have returned

guilty verdicts on the SBA mail fraud charges based on an intangible rights theory. But it is not our task to review only isolated parts of the charge. As the Supreme Court wrote in *United States* v. *Park*, 421 U.S. 658 (1975): "'[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.'" *Id.* at 674 (quoting *Cupp* v. *Naughten*, 414 U.S. 141, 146-47 (1973)). "Moreover," the Court continued, "in reviewing jury instructions, our task is also to view the charge itself as part of the whole trial. 'Often isolated statements taken from the charge, seemingly prejudicial on their face, are not so when considered in the context of the entire record of the *trial*.'" *Park*, 421 U.S. at 674-75 (quoting *United States* v. *Birnbaum*, 373 F.2d 250, 257 (2d Cir.), *cert. denied*, 389 U.S. 837 (1967)) (emphasis added by *Park* Court).

The jury charge, read as a whole, together with the description of the scheme in the indictment, to which the supposedly prejudicial instruction refers, reveals that the jury could not have found the defendants guilty on an intangible rights theory.

VI.

On this motion, appellants raise one other issue that merits discussion. They assert that the prosecutor improperly argued in its closing statement that the law presumes monetary loss where there are kickbacks. Appellants apparently contend that they are not barred from raising their objection at this stage of the proceedings because, before *McNally*, defense counsel had less reason to object to this alleged error.

In the government's rebuttal argument, the prosecutor said:

> We make no contention that the government didn't get what it paid for, that it didn't pay a fair price, or whatever. We are not arguing that in this case.

> But on the other hand, we are arguing that if you find that a kickback was involved, then the government did lose money because, as the auditors told you, kickbacks are not an allowable cost. The government shouldn't have had to pay 17 percent for Mr. Gentile's bribe payoff and 17 percent for Mr. Dillon on the PSLC marketing agreement and whatever the percent was on Remote. The government should not have had to pay those monies, and therefore, it did lose money. And the reason that we say that is the statute itself, the kickback statute, title 41, section 51 of the United Sates Code says:
>
> > Upon a showing that a subcontractor paid fees, commissions, or compensation or granted gifts or gratuities to an officer, partner, employee or agent of a prime contractor or to another higher tier subcontractor in connection with the award of the subcontract or order thereunder, it shall be conclusively presumed that the costs of such expense was included in the price of the subcontractor order and ultimately borne by the United States.
>
> Now, that is what we're saying. Not that someone else might not have sold it for the same price and it would have been a fair arm's-length deal, full disclosure, great; but that if what you find in this case is kickbacks, then the costs are borne by the United States.

Transcript ("Tr.") at 7036-37.

The prosecutor was arguing that there was at the time of the SBA scheme a civil statute that created a conclusive presumption that kickbacks were borne by the government, that the kickbacks would therefore have been disallowed had the defendants not concealed the scheme from the auditors, and that the government must therefore have lost money. Taken in the context of the trial, the prosecutor was referring back to testimony that kickbacks were not allowable costs on federal government contracts. *See, e.g.*, Tr. at 5867-68, 6092-93. The prose-

cutor's argument did not create reversible error before or after *McNally*; nor is there a substantial question as to the existence of reversible error. Upon examination of the effects that the prosecutor's argument could have had on the appellants' rights, we find that argument so clearly harmless that it does not raise a close question.

If any prejudicial ambiguity in the prosecutor's statement was not cured by the judge's correct charge, which included an admonition to the jury to ignore any purported statements of the law that differed from his instructions, *see* J.A. at 241, we find that such error was harmless even under the exacting test laid down in *Chapman* v. *California*, 386 U.S. 18 (1967), because we are "able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24; *cf. United States* v. *Lemire*, 720 F.2d 1327, 1339 & n.16 (D.C. Cir. 1983) (finding that "technical" error in jury instruction in a wire fraud case did not merit *Chapman* constitutional error analysis), *cert. denied*, 467 U.S. 1226 (1984). If we view the jury as having been instructed, in effect, to presume loss, the jury's finding of loss nevertheless depended on certain predicate facts—kickbacks and concealment from auditors—that must have been found beyond a reasonable doubt. Those predicate facts establish the loss in this case, so that no rational jury could have found the existence of those facts without also finding loss. *Cf. Rose* v. *Clark*, 106 S. Ct. 3101, 3107-08 (1986) (instruction that malice could be presumed in murder case found to be harmless error where predicate facts from which presumption flowed, and the existence of which must have been found beyond a reasonable doubt by the jury, themselves conclusively established intent). "[T]he facts found by the jury were such that it is clear beyond a reasonable doubt that if the jury had never heard the [prosecutor's 'prejudicial' statement] its verdict would have been the same." *Pope* v. *Illinois*, 107 S. Ct. 1918, 1922 n.6 (1987).

VII.

The indictment alleged a scheme to defraud the SBA of tangible rights, evidence was presented that the SBA had been defrauded of tangible rights, the prosecutor argued that the SBA had been deprived of tangible rights and the jury was charged that it could return guilty verdicts only if it found that the SBA had been defrauded of tangible rights. We find that *McNally* does not require reversal of appellants' SBA related convictions. While appellants' contention that *McNally* requires reversal is not frivolous, we do not find that it raises a close question or one that very well could be decided the other way. Appellants' motions for release pending appeal are therefore denied.

P R O C E E D I N G S

* * * *

[March 13, 1986]

(Whereupon, the jury returned to the courtroom)

THE COURT: Good Morning, Ladies and Gentlemen.

THE JURORS: Good Morning.

THE COURT: As you know, we're at the stage where the court is going to instruct you as to the law and I want, before I actually get into the instructions, I want to indicate to you how I'm going to do it and why I'm going to do it the way I'm going to do it. It will take me over an hour to give you these instructions. They've been

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[1] Page numbers at the margin of pages indicate the page numbers in the original transcript which are the jury instructions.

somewhat condensed and worked over in consultation with the lawyers. But I don't

believe that it would be possible for anyone to remember precisely everything I've said in just the way I'm saying it. Just hearing me read it once. So I wanted you to understand that while you should listen carefully to what I'm saying, and I'm sure you will, that I'm going to be sending in to you, along with the indictment and the exhibits, a written copy of what I'm about to read so that if in your deliberations you say what did that judge say about this or what did he say about that, you will have it there in writing just as I am reading it to you and be able to refer to it. I felt that would make it more convenient and more helpful for you in your work.

And while you have to consider, as I will indicate, these instructions always as a whole and not give undue emphasis to any particular one to the exclusion of any of the others from time to time the written version that you'll have in the jury room has an underlining of a word or a phrase. A good example is I'm going to be talking to you about reasonable doubt. I'm going to define reasonable doubt. You've heard the lawyers talk to you about reasonable doubt. But when I get to reasonable doubt I've got a line under it and the purpose of that underlining of a few things of that kind is just to make it easier for you to find where it was I talked about particular things because it doesn't have any index and you can flip it over and see, perhaps I've underlined

what you're looking for, perhaps I haven't, but it may help you some and that's the reason why a few of the different phrases are underlined.

Well, with that preamble we will go ahead with the instructions and at a certain stage I'll be handing to you, each of you, a copy of what I'll be referring to as a verdict form.

We've reached that stage, Ladies and Gentlemen, in the case where it becomes the duty and obligation of the court to instruct the members of the jury as to the law. You are required to follow these instructions in exercising your duty, which is to pass upon the facts in the case. You must consider these instructions as a whole. You may not ignore any instruction I'm about to give you. If any one of the attorneys or witnesses have purported to state the law

to you differently from these instructions you should ignore such statements.

First, I'm going to discuss with the members of the jury certain basic principles that apply to this and any other criminal case tried in a federal courthouse. And after that, I'm going to discuss the various counts of the indictment and the elements of the offenses that are charged in the indictment but, first, you should understand the basic principles that are to be applied in this case since it's being tried, as you know, in a federal courthouse.

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The first proposition is one that I mentioned to you at the very beginning of the case. You will, I hope, recall that I told the jury and I tell you now again, that the judge has nothing

whatsoever to do with deciding the facts in the case. Your job is to decide the facts. You're the sole judges of the facts. You are the only judges of the facts. The court has nothing to do with the facts. And that being so, I want to be sure that you understand there is nothing I'm going to do or say in the course of these instructions which is intended in any way to convey to you how you should determine the facts. What the facts are in this case is for you alone to decide.

The court's job has been to conduct an orderly trial, to rule on various matters of a legal nature that may have come up when an objection was raised in open court or when counsel came up here to the bench, and, of course, finally, to give you these instructions.

You're not to speculate about how the court feels the facts should be

decided from any ruling the court made, nor are you to try to guess what the court believes the facts are because of any remark the court made in the course of the trial or any question the court may have addressed to any witness.

What the court has attempted to do occasionally has been to clarify the evidence or to make clear to counsel

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the legal basis of a ruling, but there's nothing the court has done or said or that I'll do or say in the course of these instructions which is designed to tell you how the facts should be decided by you. You are the sole judges of the facts.

It is simply your duty to accept the law as the court is now about to state it to you. You may not disregard any instruction nor may you

question the wisdom of any rule of law as the court states it to you.

You have to decide the facts in this case from what you have heard from the witness stand, from the exhibits in evidence, from any stipulations, and from any inferences you believe reasonably deducible therefrom.

A stipulation between counsel is simply an agreement as to a particular fact with which both the United States and the defendants have concurred and you may accept any stipulated fact as if it had been proven entirely to your satisfaction in the case.

An inference is simply a deduction or conclusion which reason and common sense may lead the jury to draw from facts established by credible testimony and exhibits in the case to your satisfaction.

It is your sole responsibility whether to draw inferences or not to draw inferences from the facts you find based on the evidence.

There are two types of evidence which you should

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consider and from which you may determine the facts in the case. One is called direct evidence. One is called circumstantial evidence.

Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as a witness who says what he saw or heard or did. Circumstantial evidence is proof of a chain of facts and circumstances indicating, in effect, a fact, or indeed, the guilt or innocence of a defendant.

You should understand that the law makes no distinction between the weight to be given to either direct or

to circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than of direct evidence.

Circumstantial evidence is sufficient, either alone or in combination with direct evidence, to establish a fact. In fact, circumstantial evidence may contradict and overcome direct and positive testimony. You should consider all the evidence in the case, both the direct evidence and the circumstantial evidence.

It's the duty of counsel to object when the other side offers testimony or other evidence which counsel believes is not properly admissible. If during the course of the trial the court sustained an objection by any counsel to a question you are to disregard the question and you must not speculate as to what the answer would have been. If,

after a question was asked and an answer given by a witness the court ruled

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that the answer should be ignored or stricken you are to disregard both the question and the answer in your deliberations. If an attorney suggests by a question that something occurred which is not admitted by the answer or otherwise established by the evidence in the case you're to ignore whatever is suggested by the question.

In the course of the case facts have been occasionally suggested to you that you may realize have not been proven. This often happens during a relatively long trial such as this. An attorney on one side or the other may have indicated he would prove something that later he failed to do or for any one of a variety of reasons. Or an attorney on one side or the other may have

indicated he would prove something that later he failed to do or for any one of a variety of reasons or an attorney on one side or the other may have asked a witness if such and such is not a fact and then when the question was denied or the court struck it the fact never was brought up again or proven in some other way. You should ignore any facts suggested to you in this way are not proven. You should not even speculate about these suggestions or give them any weight.

You've heard able argument of counsel on both sides. I want to remind you of what I believe I've already told you and that is that is that any statement of counsel in the opening statement or in the closing summary arguments which were just made to you are not evidence. The statements and arguments of counsel are not evidence.

They're only intended to assist you in understanding the evidence and the contentions of the

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parties. If your recollection of the evidence disagrees with counsel's recollection it is your recollection and your recollection alone that controls.

You should understand that this has been a lengthy trial and even though substantial argument time was allotted to the attorneys counsel's time was limited. If there are facts that came to your attention in the course of the trial which none of the counsel on either side had an opportunity to mention in the course of the arguments you're to consider those facts as well as facts mentioned by counsel which conform to your own recollection of the evidence. You must understand that it is your recollection and your recollection alone

that controls on all aspects of the evidence.

In this, as in every criminal trial, the United States has the burden of proof. Every defendant in a criminal trial is presumed to be innocent and this presumption of innocence attaches to the defendant throughout the trial. The burden is on the government to prove the defendant guilty beyond a reasonable doubt. And if the government fails to sustain this burden then you must find the defendant not guilty. The defendant is not required to establish his innocence under our system of jurisprudence.

Every defendant in a criminal trial has the absolute right not to testify. You must not draw any inference of guilt against a defendant because he did not testify.

The court will use the term reasonable doubt on a number of occasions later in the course of these instructions and it's important that you understand what is meant in law by reasonable doubt. It is a doubt based on reason. It does not man any doubt whatsoever. It is not a fanciful doubt or a whimsical doubt nor a doubt based wholly on conjecture. Proof behind a reasonable doubt is proof to a moral certainty but not necessarily proof to a mathematical or scientific certainty. A reasonable doubt is one which is reasonable in the jury's view of the evidence as a whole.

Perhaps this will help you better to understand what the court is attempting to say. A defendant is never to be convicted on mere suspicion on conjecture or the possibility of guilt.

If after impartial comparison and consideration of all of the evidence you can candidly say that you have such doubt as would cause you to hesitate to act in matters of importance to yourself then you have a reasonable doubt. But if after such impartial comparison and consideration of all of the evidence you can truthfully say you have an abidding conviction of the defendant's guilt such as you would not hesitate to act upon and the more weighty and important matters relating to your own personal affairs then you do not have a reasonable doubt.

I want to caution you at this stage against permitting the character of the charges of in this case to affect your

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minds in arriving at your verdict. You must permit only the evidence in the case to enter into your deliberations and

findings. Moreover, the weight of the evidence in this case is not necessarily determined by the number of witnesses testifying on one side or about any particular aspect of the case. You should consider all the facts and circumstances in evidence and determine the facts in the case accordingly.

Now, of course, as judges of the facts you must weight the credibility of the witnesses. In determining whether the government has established any charge or charges here beyond a reasonable doubt you're required to weigh the testimony of the witnesses and all of the facts and circumstances concerning which the witnesses have testified. You and you alone are to determine whether to believe any witness and the extent to which any witness should be credited. And if there is any conflict in the testimony, as there is here, it is your

function to resolve the conflict and to determine where the truth lies.

As you know, a defendant may be a witness in his own behalf. His testimony should not be disbelieved merely because he is a defendant. In weighing a defendant's testimony you should appraise his testimony by the same standards as to credibility which the court is now indicating to you are applicable to any other witness. And in the end you should give his testimony such weight as in your judgment you feel

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it fairly entitled to receive.

Now, how do you go about this to reach a conclusion as to the credibility of a witness? In weighing the testimony of witness you may consider any matter that you feel has a bearing on the subject. You ought to use your everyday common sense. You may consider

the demeanor and behavior of the witness on the witness stand, the witness's manner of testifying, whether the witness impresses you as a truthtelling individual, whether the witness impresses you as having an accurate memory and recollection, whether the witness has made any inconsistent statements, whether the witness has any motive for not telling the truth, whether the witness had full opportunity to observe the matters concerning which the witness has testified and whether the witness has any interest, vital or otherwise, in the outcome of the case. You may consider the reasonableness or unreasonableness, the probability or improbability of the testimony of a witness in determining whether the witness has been contradicted or has been corroborated by other credible evidence and whether you will accept it

as true and accurate if it so has been. And in the end you should give such weight to the testimony of each witness as in your judgment you feel it fairly entitled to receive.

If two witnesses disagree about some fact it doesn't follow that one is lying and not telling the truth. Two

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credible witnesses may have, in good faith, different recollections or one may recall an event that another may not remember. If it appears to you that any counsel while examining witnesses was in any way directly accusing a witness of lying you should disregard it. You and you alone are the sole and only judges of the credibility of the witnesses.

As I have indicated before, it if appears that a witness made a statement inconsistent with a statement made by the witness while under oath here

during the trial, whether the previous statement was under oath or not, you may, if you wish, consider the inconsistency in weighing credibility. However, as I've instructed you before, unless the prior statement was made under oath it is not evidence of the facts stated in the prior inconsistent statement. Only statements made by a witness in this trial under oath or prior inconsistent statements made under oath with which the witness was confronted are evidence of the facts stated.

You should keep in mind, of course, that a simple mistake by a witness doesn't necessarily mean that the witness was not telling the truth as he or she remembers it. People naturally tend to forget some things or remember other things inaccurately. So if a witness has made a misstatement you need to consider whether that misstatement was

simply an innocent lapse of memory or an intentional falsehood. In considering this you may consider whether the statement has

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to do with a fact important to the witness at the time it occurred or the statement concerned only an unimportant detail.

False or inconsistent statements by a defendant in explanation or defense after a crime has been committed do not create a presumption of guilt. You may consider evidence of such falso or inconsistent statements, however, as tending to prove the defendant's consciousness of guilt. You're not required to do so. You should consider and weigh evidence of false or inconsistent statements by the defendant in connection with all the other evidence in the case and give it such weight as

in your judgment it's fairly entitled to receive.

Accomplices in the commission of a crime, such as Gentile, Dillon and Muldoon are alleged to have been in this case, are competent witnesses and the government has a right to use them as witnesses. An accomplice is anyone who knowingly and voluntarily cooperates with, aids, assists, advises or encourages another person in the commission of a crime in order to help bring it about regardless of his degree of participation.

The testimony of an alleged accomplice should be received with caution and scrutinized with care. You should give it such weight as in your judgment it's fairly entitled to receive. You may convict the defendant solely on the uncorroborated testimony of an alleged accomplice only if you believe

that the testimony of the accomplice proves the

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guilt of the defendant beyond a reasonable doubt.

In this connection you have heard testimony from certain witnesses called by the United States who have agreed to provide truthful testimony in exchange for a promise by the government for favorable treatment in dealing with the witness's own conduct, such as immunity from prosecution or bringing less serious charges.

The government may present the testimony of someone who has been promised favorable treatment in his own case in exchange for his willingness to testify. Some people in this position are entirely truthful when testifying. Still you should consider the testimony of such a witness with morer caution

than the testimony of other witnesses. He may have had reason to make up stories or exaggerate what others did because he wants to strike a good bargain with the government about his own case.

Mr. Dillon and Mr. Muldoon entered pleas of guilty to offenses different from the offenses alleged in the indictment. These guilty pleas have nothing whatsoever to do with the guild or innocence of any of the defendants on trial. You may consider the conviction of Mr. Dillon as a felon only in weighing the credibility of his testimony in court along with all the other facts and circumstances you consider in weighing credibility.

An attempt to suppress or fabricate evidence or

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other testimony or other evidence by a defendant after a crime has been

committed does not create an impression of guilt. Some innocent people charged with serious offenses may resort to various means, both lawful and unlawful, to insulate themselves from successful prosecution. You may consider evidence of such attempt to suppress or fabricate evidence, however, as tending to prove the defendant's consciousness of guilt. You're not required to do so. You should weigh evidence of such an attempt by the defendant in connection with all the other evidence in this case and give it such weight as in your judgment it's fairly entitled to receive. Of course, as I have instructed you before, it is not improper for the defendants with their counsel to get together after indictment to discuss their case in aid of trial and I've encouraged them in this trial to do so.

The government has presented prepared charts and summaries and testimony summarizing what is presented on these exhibits. Some similar charts have been presented by the defendants. During your deliberations you will also have available similar summary charts of some of the defendants. These charts and summaries have been received for the sole purpose of explaining selected facts disclosed by books, records, testimony and other evidence in the case.

Such testimony, charts and summaries are not in and of themselves proof of the facts. If such charts and

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summaries do not correctly reflect the facts or figures shown by credible evidence, as you recall the testimony or determine from the exhibits, then you should disregard those charts to the

extent they are incorrect or disagree with your recollection of the proof.

In other words, such charts or summaries of testimony and so forth are to be used only as a matter of convenience. They do not corroborate or reinforce the proof and are of no greater significance than the evidence they purport to summarize and then only to the extent you find that evidence credible. So if, and to the extent that, you find that they are not an accurate accurate presentation of the facts shown by the proof as you determine the facts to be you are to disregard them.

One other matter of general character. The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call expert witnesses. An expert in a particular field is permitted

to give his opinion in evidence and an expert witness, as you recall, was called by one of the defendants. Witnesses, who by education and experience have become expert in some art, science, profession or calling may state an opinion as to relevant material matter in which they profess to be expert and they also may state their reasons for their opinion.

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You're not bound by the opinion of the expert. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience or if you should conclude that the reasons given in support of the opinion are not sound or that the opinion is outweighed by other evidence you may disregard the opinion in whole or in part. In other words, you should consider the expert testimony in connection with the other evidence in the

case and give it such weight as in your judgment it's fairly entitled to receive.

Now, Ladies and Gentlemen, those are the general considerations that I wanted to place in your minds. I'm now going to turn to a discussion of this case. It is appropriate to turn now to a more specific discussion of the case and I must first explain how you may view the evidence in deciding whether or not a particular defendant is guilty or not guilty or involvement in a joint scheme or agreement alleged. You'll recall that I suggested at the beginning of the case you should focus on what each defendant said, what he did and what he heard. I told you then I would later indicate how you should proceed in determining whether or not the proof as to what one defendant said or did could be considered as evidence against him or

another defendant in reaching your verdict.

A defendant may be held responsible for what others

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say or do in furtherance of a scheme to commit crimes if the defendant becomes a member of a joint scheme or agreement to commit certain crimes. Such a joint scheme or agreement is a kind of partnership in criminal purposes in which each member becomes the agent or partner of the other member or members.

To find that a defendant was a member of a joint scheme or agreement he must be shown by the evidence beyond a reasonable doubt, first, that there was a joint scheme or agreement in which two or more persons in some way or manner came to a mutual understanding to accomplish an illegal purpose or purposes.

Second, that the defendant knowingly and willfully associated himself with the common scheme or agreement, knowing of its illegal purpose or purposes, and, third, that the defendant participated in the scheme as something he wished to bring about and sought by some action or failure to act to make it succeed. Such an act or omission may be entirely innocent when considered alone but must be committed for the purpose of accomplishing some object of the unlawful scheme or agreement in a knowing and willful manner.

In deciding whether a defendant was a member of a scheme or agreement you should consider whether or not on all the evidence there's proof beyond a reasonable doubt that the defendant knowingly entered into the scheme and was a

willing participant.

It is not necessary that an alleged illegal scheme or agreement be written out like a contract or even openly discussed among the participants. Such a scheme or agreement may develop over a long period of time and may be established by circumstantial evidence showing a chain of events from which the existence of the scheme or agreement is inferred.

Moreover, a person may become a member of a joint scheme or agreement without knowing all of the details of the unlawful scheme and without knowing who all the other members are. So, if a defendant has an understanding of the unlawful nature of a plan and knowingly and willfully joins in that plan by his action or failure to act, even on one occasion, that is sufficient to hold him

responsible for the actions of other members done in furtherance of the scheme even if he did not participate in the scheme earlier and even if he played only a minor part.

Of course, mere presence at the scene of a transaction or event or the mere fact that certain persons may have associated with each other does not alone establish proof of an unlawful scheme or agreement. Also, a person who happens to act in a way which advances some purposes of an unlawful agreement or scheme but had hot knowledge of it is not a member of the scheme or agreement or responsible for all the acts of its members even if his conduct unwittingly helped others

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to carry out an illegal venture.

In this case the government has alleged that certain persons who are not defendants participated in joint schemes

or agreements with some or all of the defendants. These have been identified as Mr. Gentile, Mr. Muldoon, Mr. Reid, and Mr. Dillon. Three of these men have testified. If you find that a defendant was a member of an illegal scheme or agreement with one or all of these men or one or more of the defendants, or both, you may consider the action or statements of those who were members of the illegal scheme or agreement with the defendant as evidence against the defendant if such action or statements were made or done during the scheme or agreement's existence and in furtherance of its purposes.

Only if a defendant is shown to be connected to a scheme or agreement beyond a reasonable doubt under the standards that I have outlined can you take into account against him anything done or said in furtherance of the

scheme by another member of the scheme or agreement even though the defendant did not say, do or learn of it.

A person who personally commits an act which the law declares to be a crime is guilty, of course, of committing that crime. It's also a crime, however, to aid or abet or procure or induce another person to commit such an act. Whoever aids, abets, counsels, commands, induces or procures the commission of a crime by directing others to act or by

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acting in a joint scheme or agreement with others is punishable as if he had personally committed each of the acts constituting the crime. The government in this case relies in part on this principle of aiding and abetting under which a defendant may be found guilty of the crime charged in the indictment

without finding that the defendant personally devised every aspect of the scheme charged or that he engaged in all of the acts charged.

Thus a defendant may be found guilty of a crime which he does not personally commit where he knowingly and on purpose causes another to commit some or all of the necessary criminal acts. In such a case the defendant may be found guilty even though the person he caused to act does so innocently. If you find beyond a reasonable doubt that a defendant personally or in concert with others willfully caused others to perform criminal acts the defendant is responsible for those actions.

Now, perhaps you've noticed that in this discussion, as I will continue to do, I've referred to the defendant or I've referred to a defendant. Of course, we all know there

are four defendants here on trial. I've done this deliberately to again remind you that you must consider and weigh the testimony as to each defendant just as if he were being tried here alone. Each defendant is entitled to separate consideration on the evidence relating to him and separate consideration

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as to each count charged. Therefore, each offense, each defendant, the evidence pertaining to each count against each particular defendant must be considered separately and individually.

There are a variety of schemes alleged and you are reminded that each must be considered separately. If it appears to you that as to some scheme charged the defendant is on the fringes or that the proof as to him is limited you have a special duty to make sure that

the proof is sufficient to establish the requirements I've set out.

You are not to allow any judgment as to the involvement of others, if you have such judgment, to sway your decision as to any defendant or defendants. On the other hand, if the proof is sufficient, the fact there was less proof as to a defendant compared to some other defendant is of no consequence as to the result so long as the evidence is sufficient to establish guilt beyond a reasonable doubt.

There are many contracts and transactions shown by the evidence that are not in dispute. Central to your deliberations, among other things, will be your determination deliberations, among other things, will be your determination of the intent with which the participant in these contracts and transactions acted. Intent is sharply

contested, and you have heard testimony and had different inferences and conclusions urged upon you based on the events shown in the record. It is important that you understand what type of intent we are concerned with in this case.

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Intent means that a person had the purpose to do a thing. It means that he acted or failed to act with the will to do or not do the thing. It means that he acted or failed to act consciously or voluntarily and not inadvertently or accidentally.

Some criminal offenses require only a general intent. Where this is so, and it is shown that a person has knowingly committed an act which the law makes a crime, intent may be inferred from the doing of the act.

However, the offenses involved in this case, mail fraud and bribery, require a specific intent. Specific intent requires more than a mere general intent to engage in certain conduct or to do certain acts. A person who knowingly does an act which the law forbids, intending with bad purpose either to disobey or disregard the law, may be found to act with specific intent.

Direct proof of intent is rarely available. Intent is a state of mind. Intent ordinarily cannot be prove directly because there's no way of fathoming and scrutinizing the operations of the human mind but you may infer the defendant's intent from the surrounding circumstances. You may consider any statement made and act done or omitted by the defendant, and all of the facts and circumstances and evidence which indicate his state of mind. You may, but you're

not required to, consider that a person ordinarily intends the natural

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and probable consequences of acts knowingly done or knowingly omitted. You should consider all the circumstances in evidence that you deem relevant in determining whether the government has proved beyond a reasonable doubt that the defendant acted with the required intent.

It's now against this background time to consider the particular charges involved in this case as set forth in the indictment. You've heard references to the indictment at various stages. I want to remind you that the indictment is not evidence. The indictment raises absolutely no inference of guilt. The indictment is merely the method by which the defendant

is apprised of charges against him and brought to trial.

Now, I am going to ask the marshal to distribute to you here copies of what is headed "verdict form." I want all of you to have one, and will you see that counsel -- I think counsel already have one. Everyone has got one?

Very well.

In order to aid your understanding of each count and indeed to aid the instructions I'm about to give you concerning the various elements of each offense charged which it is the burden of the government to prove as to a defendant beyond a reasonable doubt I've prepared this so-called verdict form which you have in your hands.

What I propose to do is discuss each count of the

indictment. You must, of course, consider each count separately and you must consider the evidence as to each defendant as it relates to each count separately.

In each instance you must consider whether or not, based on the totality of the credible proof, the defendant charged is guilty or not guilty of the particular offense charged. You may not find that the defendant is guilty unless you are satisfied and unanimously agree that the proof establishes beyond a reasonable doubt that each and every element of a particular offense charged in the count has been established as to him.

The fact that you may find a defendant guilty or not guilty under one count should not determine or influence your determination of the guilt or

innocence of any other defendant named in the same count or the guilt or innocence of that defendant under any different count in which he may be charged.

Now, you will notice that the verdict form starts with RICO. And what we are concerned with here is count two of the indictment. When you get the indictment you will see there is a count one of the indictment. The United States considers count one as no longer necessary because count two concerns the carrying out of what was alleged in count one. There are references to the text of count one in the body of count two which you may consider but you are not asked

to consider or render a verdict on count one, which is no longer in the case. And you shouldn't draw any inference of any kind from the fact that count one is no longer in the case, favorable or

unfavorable to any party or site in this case. Count two is the only RICO count before you and the only RICO count you have to consider.

The indictment charges that from on or about January, 1977 and continuously thereafter up to and including August 6, 1985 defendants Perholtz and Jackson were each associated with an enterprise which engaged in or had activities which affected interstate commerce and that they knowingly and willfully participated in the conduct of the enterprise's affairs through what is called a pattern of racketeering activity in violation of the RICO statute. A defendant's participation is knowing and willful if it is done on purpose, deliberately, voluntarily and not because of mistake, inadvertence or accident.

As I told you at the beginning of the case the term racketeering is simply a term taken from the statute and shouldn't be considered as having the implications particularly associated with the word racketeering. It doesn't mean that either of the defendants charged under RICO was connected with the Mafia or a mobster or anything like that. The term should not have anything to do with your determination of the guilt or innocence of any of the defendants. It's just

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a word congress used in naming the statute and therefore it's the term we use.

In order to find a defendant guilty under RICO you must find each of the following elements have been established beyond a reasonable doubt.

First, that an enterprise existed as charged in the indictment.

Second, that the defendant was associated with the enterprise.

Third, that the enterprise was engaged in or that its activities affected interstate commerce, and,

Fourth, that the defendant knowingly and willfully directly or indirectly conducted or participated in the conduct of the affairs of the enterprise through a pattern of racketeering activity.

Proof of a pattern of racketeering activity, as I will instruct you in more detail later, requires proof beyond a reasonable doubt that the defendant committed two or more criminal acts, in this case acts of bribery or mail fraud, and that these acts were part of a pattern of criminal activity.

If you find that any of these elements has not been established beyond a reasonable doubt as to a particular defendant you must find that defendant not guilty of RICO.

First you must determine whether an enterprise existed

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as charged in the indictment. An enterprise may be a legally recognized entity such as a corporation or a partnership but it need not be. An enterprise may be a group of people, partnerships and corporations that become associated together in an organized continuing unit for a common purpose of engaging in a legal or illegal course of conduct.

The indictment charges that the enterprise in this case was a group of individuals, partnerships and corporations associated for the common

purpose of unjustly enriching themselves from the proceeds of government contracts and subcontracts for computer services and equipment which had been and would be obtained by means of bribery, fraud and circumvention of government contracting procedures.

According to the indictment, as you will see, this group consists of defendants Perholtz, Jackson, John Gentile, Gregory Fletcher, Conley Dillon, Lloyd Root, Jr., ATL Corporation, IBS, Printer Systems Corporation, also known as PSC, Computer Systems Support Corporation, also known as CSSC, Remote Computer Services Corporation, Computer Consultants International, also known as CCII, Professional Design Services, Fairlington Properties, Southern Properties, and Computer Contemporaries, Inc., also known as CCI.

Not all of the individuals, partnerships and corporations named in this group are charged with knowingly participating in RICO by committing the Racketeering Acts

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which I will describe. For example, neither defendant Fletcher nor Root are so charged. They're only charged with mail fraud in connection with the Small Business Administration Procurement. Although there may be references to Fletcher or Root in this count of the indictment they're not charged in any way RICO and you should not draw any conclusion or inference from the mention of their names in the indictment. You should be careful not to let the fact that they are being tried in the same trial influence your verdict. As I told you at the beginning, each defendant is entitled to your separate consideration

of the charges and the evidence against him as if he were being tried alone.

It is not necessary that the enterprise, if it existed, have any particular or formal structure but it must have sufficient organization that its members functioned and operated together in a coordinated manner in order to carry out the common purpose alleged.

The membership need not include every one of the entities I have listed as long as you find that it was substantially the same as the enterprise described. The membership of the enterprise may change over time but the enterprise must have a continuous organization, purpose and core of personnel that remain essentially unchanged during the period charged in the indictment.

If you find beyond a reasonable doubt that this

group of individuals, corporations and partnerships had a common purpose and an ongoing informal organization by which the various individuals, partnerships and corporations functioned as a continuing unit then, but only then, may you find that an enterprise existed as charged in the indictment.

Next, if you determine that an enterprise existed as charged in the indictment you should consider whether the defendant was associated with the enterprise. A defendant becomes associated with the enterprise if he joins by knowingly and willfully participating directly or indirectly in the conduct of the enterprise. Association need not be formal. It may be by means of an informal or loose or even secret relationship.

In determining whether the enterprise specified in the indictment existed and whether a defendant was a participating member you may rely on circumstantial evidence. The affairs of the enterprise may be conducted in secrecy and involve a minimal amount of contract between the participants. You may draw any natural and reasonable inference arising from any of the evidence of association or from any course of conduct by members of the enterprise.

If you find beyond a reasonable doubt that the enterprise existed in substantially in the form alleged and that the defendant was a participating member, that is sufficient to establish these first two elements of the RICO offense.

If you determine that the defendant was associated with the enterprise you should next consider the third element, whether or not the enterprise engaged in or had activities that affected interstate commerce. Interstate commerce means commerce between any two states of the United States or any state and the District of Columbia. No particular degree of effect on interstate commerce need be shown. Indeed, the effect may even be minimal. If you should find beyond a reasonable doubt that any of the activities of the enterprise, including the racketeering acts I will describe later, were committed in conducting the affairs of the alleged enterprise and the activities affected interstate commerce the required effect on interstate commerce is established.

If you determine that the defendant was associated with the enterprise that affected interstate commerce you should consider the fourth and final element which must be established beyond a reasonable doubt, whether he directly or indirectly conducted or participated in conducting the affairs of the enterprise through a pattern of racketeering activity.

To conduct or participate in the conduct of simply means to perform acts, functions or duties which relate to the operation of the enterprise.

Proof of a pattern of racketeering activity requires proof beyond a reasonable doubt that the defendant knowingly

and willfully committed or aided and abetted the commission of at least two of the 37 racketeering acts alleged,

including one or more of the acts which allegedly occurred after August 6, 1980, and,

Two, that these acts were connected with each other in some common scheme, plan or motive so as to be a pattern of criminal activity and not merely a series of separate isolated and disconnected acts.

These racketeering acts consisting of alleged acts of bribery an mail fraud, are identified in your verdict form in the note that you will see which is headed "note regarding racketeering acts."

Act one charges defendant Perholtz and defendant Jackson with bribery in connection with the FLSA Procurement sometime between January, 1977 and March, 1978.

Acts two charges that Perholtz and Jackson committed bribery in

connection with the ATAP, A-T-A-P, procurement sometime between January, 1977 and January, 1979.

Acts three through 36 charge that Perholtz and Jackson committed mail fraud in connection with the ATAP Procurement. The alleged mailings that are the basis for these alleged mail frauds are listed in government exhibit 418. If you find unanimously beyond a reasonable doubt that a particular defendant committed mailfraud by participating in a scheme that caused one or more of these alleged mailings

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you are advised that each mailing you so find constitutes a separate racketeering act as to that defendant.

Act 37 charges defendants Perholtz and Jackson with mail fraud in connection with the SBA-DCS Procurement. The alleged mailings that are the basis

of this single racketeering act are listed in government Exhibits 428A, 428B, and 428C. In order to find the defendant committed this racketeering act you must be unanimous in finding beyond a reasonable doubt that the defendant is guilty of mail fraud in connection with at least one particular mailing in this list. All of these alleged mail frauds are charged as one racketeering act. Therefore, even if you find beyond a reasonable doubt that a particular defendant is guilty of mail fraud in connection with more than one of these alleged mailings they may only be counted as one racketeering act for that defendant.

You may also notice that some of the alleged mailings also appear in later mail fraud counts. As indicated in the verdict form they are listed in government exhibit 418A and 428.

In order to convict a defendant the evidence must establish beyond a reasonable doubt that the defendant knowingly and willfully committed or aided and abetted at least two of these 37 racketeering acts.

In addition, you must find that at least one of

the racketeering acts occurred after August 6, 1980. If you find that the proof as to a particular defendant only shows that he committed or aided and abetted listed racketeering acts which occurred before August 6, 1980 you must find him not guilty of RICO. However, several of the racketeering acts listed allegedly occurred after August 6, 1980 and if you find that any or all of the acts committed -- if you find that any or all of the acts committed or aided and abetted by a particular defendant in a

pattern of racketeering activity occurred after that date that is sufficient to establish this element.

In a moment I will instruct you on the elements necessary to prove beibery and mail fraud. In order to find that a defendant committed two or more of the listed acts you must find unanimously that all of the elements for each such an offense, be it mail fraud or bribery, have been proved beyond a reasonable doubt.

As to each act the proof must show beyond a reasonable doubt that the defendant committed or aided and abetted the offense knowingly and willfully, that is to say, he acted deliberately, voluntarily and on purpose and not because of mistake or accident.

I remind you that you must consider defendant Perholtz and defendant Jackson, the only defendants charged with

RICO offenses, separately. As to a defendant you must

determine whether each of the necessary elements have been proved beyond a reasonable doubt as to him.

You are further instructed that you may not find a defendant guilty of RICO unless you agree unanimously that the defendant committed or aided and abetted two particular racketeering acts, including at least one particular act which occurred after August 6, 1980. In other words, it would not be sufficient if some of the jurors should find that a defendant committed or aided and abetted two particular acts listed on the verdict form while other jurors found that he committed two different acts. You must all agree upon at least two particular racketeering acts were committed by the defendant, one of which

must be after August, 1980 before you can find the defendant guilty of RICO. However, you need not find that both defendants Perholtz and Jackson committed the same racketeering acts.

If you find that a defendant committed or aided and abetted two or more of the 37 racketeering acts, including at least one racketeering act which occurred after August 6, 1980 you must also be satisfied beyond a reasonable doubt that the acts were part of a pattern of racketeering activity, meaning that they were connected with each other by some scheme, plan or motive so as to constitute a pattern. It does not matter that the type of offense charged, mail fraud and bribery, are different so long as you find that they were

committed as part of a pattern of criminal activity, as I have defined it, rather than isolated disconnected acts. A series of disconnected crimes does not constitute a pattern of racketeering activity.

Thus, to repeat, in order to find a particular defendant guilty of RICO offense you must find unanimously as to that defendant beyond a reasonable doubt that the enterprise charged existed and the defendant was associated with it, that the enterprises affected interstate commerce and that the defendant conducted or participated in the affairs of the enterprise through a pattern of racketeering by committing or aiding and abetting the commission of two or more of the racketeering acts identified in the verdict form, including one or more acts which occurred

after August 6, 1980 in a pattern of criminal activity.

Now, if you will turn to the second page of the verdict form. If, and only if, you find defendant Perholtz guilty of RICO you should list on the verdict form, in the space provided, the number of all the racketeering acts you have unanimously agreed defendant Perholtz committed or aided and abetted, in reaching your verdict. You're not required to consider all of the racketeering acts but you may consider more that two and if you wish, all of them.

Likewise, if, and only if, you should find defendant Jackson guilty of RICO you should list on the verdict form

in the space provided, the number of all the racketeering facts you have unanimously agreed defendant Jackson

committed or aided and abetted, in reaching your verdict.

Now, what must be proved beyond a reasonable doubt before you may find the defendants committed racketeering acts or bribery and/or mail fraud as charged?

First I want to talk about bribery. Racketeering Acts One and Two involve charges of bribery. Each allegedly occurred prior to August 6, 1980. Two types of bribery are involved. Charges that bribery was committed by offering a bribe to a public official, in his case a post office official, and charges that bribery was committed by a post office official soliciting a bribe.

Specifically, defendant Perholtz is charged with offering bribes to postal officials Gentile and Frank Jackson in connection with the FLSA and ATAP Procurement. Defendant Jackson is

charged with offering a bribe to postal official Gentile in connection with these same procurements. Alternatively, defendant Jackson, as a postal official, is also charged with soliciting a bribe from Gentile and Perholtz.

In order to prove that a defendant committed bribery by offering a bribe the government must prove beyond a reasonable doubt that the defendant offered or promised something of value to an official of the United States Post Office, that the defendant made the offer knowingly and willfully for the purpose and with the specific intent of influencing

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the official in an official act. I've already defined the difference between general intent and specific intent which must be proved beyond a reasonable doubt

in order to find that a defendant committed or aided and abetted bribery.

In order to prove a defendant committed bribery by soliciting or accepting a bribe while a government official the government must prove beyond a reasonable doubt that the defendant was a public official, that he knowingly and willfully and with specific intent asked, solicited or sought something of value in return for being influenced in performing his official duties.

A public official includes any officer or employee acting on behalf of the United States Postal Service in some official function.

An official act includes any decision or action on any matter which may be brought before any public official in his official capacity or in his place of trust.

The purpose of the statute is to protect the integrity of official acts from the temptation of offers of things of value and to prohibit officials from corruptly soliciting things of value purporting to influence official acts. All that is required to establish bribery is that the defendant committed the act of promising or solicing the thing of value with the specific intent to influence or be influenced in the performance of official duties. Even if these

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were fully performed in a competent manner without harm to the Government the integrity of the official act or acts is deemed compromised by the offer of the solicitation of a bribe.

Therefore, it doesn't matter if the official act to be influenced would have been done any way regardless of

whether the bribe had been offered, promised or solicited. That is to say, if you find that a bribe was promised, offered or solicited it doesn't matter whether Gentile or Jackson in fact acted as they normally would have if a bribe had not promised or solicited.

It does not matter if the official lacks the power or authority to do the requested act or it turns out that there was actually no reason to seek to influence any official conduct. Nor does it matter that the official act desired or promised was a lawful act or that it was desirable or in the public interest.

It doesn't matter whether the bribe was ever paid. An individual offering the bribe is guilty of bribery once the offer has been made. Likewise, an individual is guilty of bribery once he intentionally asks and solicits a bribe payment in return for being

influenced in an official act. The mere offering of a bribe or solicitation of a bribe is just as much a crime as actually giving one. A defendant may be guilty of offering or soliciting a bribe if he aids or abets the offer or the receipt.

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I've already mentioned bribery requires proof of specific intent. It must be proved beyond a reasonable doubt that the defendant had the specific intent to offer or promise or solicit a bribe in order to find him guilty of bribery.

Therefore, on Racketeering Acts One and Two, if you find beyond a reasonable doubt that the defendant Perholtz knowingly and willfully offered or promised something of value to Postal Official Gentile or to Jackson for the purpose and with the specific intent of influencing or encouraging an official

act in connection with the FLSA or ATAP procurement you may find that he committed the corresponding racketeering act.

If you find beyond a reasonable doubt the defendant Jackson knowingly and willfully offered or promised something of value to Post Official Gentile for the purpose and with the specific intent of influencing or encouraging an official act in connection with the FLSA or ATAP procurement you may find that he committed the corresponding racketeering act.

Alternatively, if you find beyond a reasonable doubt the defendant Jackson, an* an official of the Post Office, knowingly and willfully and with a specific intent directly or indirectly solicited or sought something of value from Perholtz or Gentile in return for

being influenced in his official acts in connection with the FLSA or ATAP procurement you may find that he committed the corresponding racketeering

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act. As to any of the alleged briberies, if any element is not established beyond a reasonable doubt you must find the defendant not guilty.

The remaining racketeering acts charge defendants Perholtz and Jackson with mail fraud. The remaining counts of the indictment also charge mail fraud and you will need to apply these instructions in considering the mail fraud racketeering acts and the separate mail fraud counts which I will come to later in this discussion. I will explain this when I discuss the various mail fraud acts in more detail.

In order to prove mail fraud the Government must prove beyond a

reasonable doubt that the defendant knowingly and willfully devised or aided and abetted others in a scheme or artifice to defraud or to obtain money by false pretences* and misrepresentations, and that the United States mails were used in furtherance of the scheme to defraud as specified in the indictment and that such use of the mails was reasonably foreseeable or that the defendants knew the use of the mails would follow in the ordinary course of business.

The word "scheme" includes any plan or course of action by one or more persons intended to deceive others, or to obtain money or property by false and fraudulent pretences or representations.

A scheme to defraud is merely a plan to gain advantage over others or obtain something of value by false

representations, trick, deception, deceit or deliberate disregard of the truth.

A statement or representation is false or fraudulent if it relates to a material fact and is known to be untrue or is made with reckless indifference as to its truth or falsity and is made or caused to be made with intent to defraud.

A statement or representation may also be false or fraudulent when it constitutes a half truth or if it effectively conceals a material fact with intent to defraud. The material fact is a fact that would be important to a reasonable person in deciding whether to engage or not engage in a particular transaction.

To act with intent to defraud means to act knowingly and with a specific intent to cheat or deceive someone ordinarily for the purpose of

causing some financial loss to another or bringing financial gain to one's self. As with bribery, mail fraud requires specific intent, which I have already defined fully to you.

Since specific intent to defraud is an essential element of the crime of mail fraud, good faith on the part of the defendant is a complete defense. However misleading or deceptive a plan may be it is not fraudulent if it was devised or carried out by the defendant in good faith. A defendant does not have the burden to establish the defense of gocd faith. The burden is on the Government to prove

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fraudulent intent and lack of good faith beyond a reasonable doubt. Evidence which simply establishes that a person made a mistake in judgment or an error in

management or was careless doesn't establish fraudulent intent.

The defendant's participation in the scheme must be knowing and willful, that is to say, on purpose, voluntary, and deliberately and not as a result of accident or mistake.

It is not necessary to establish that a defendant himself originated the scheme to defraud nor is it necessary that a defendant realize any gain from the scheme. Nor is it necessary to show that the intended victim was actually defrauded. The gist of the mail fraud offense is the willful use of the mails in carrying out or in attempting to carry out a scheme to defraud.

It is also not necessary that the prosecutor prove all of the details alleged concerning the precise nature and purpose of the scheme. It is sufficient

if the proof establishes beyond a reasonable doubt that the defendant knowingly and willfully devised or aided and abetted a scheme substantially the same as the one alleged in the indictment.

Thus, in order to sustain the charges against each defendant the evidence as to each defendant must show beyond a reasonable doubt that the defendant purposely associated himself with the alleged scheme to defraud, knowing that his participation in the scheme was calculated to deceive others.

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If you find that the proof as to the defendant does not establish knowing and willful participation in the alleged scheme with the specific intent to deceive you should find the defendant not guilty.

Finally, it must be established beyond a reasonable doubt that the United States mails were used to further the scheme as specified in the indictment. And that such use of the mails was reasonably foreseeable or that defendnat* knew that the use of the mails would follow in the ordinary course of business.

The defendant need not be personally involved in the mailing and there is no claim that any defendant was personally involved in the mailings specified here. All that is required is that the particular defendant willfully participated in a scheme and that the use of the mails was foreseeable and closely related to that scheme.

When a defendant knowingly and willfully participates in a scheme to defraud with knowledge that the use of the mails in furtherance of the scheme

will follow in the ordinary course of business or where such use of mails could be reasonably foreseen, even though not actually intended, then he causes the mails to be used, and may be found guilty of mail fraud.

The mailed matter need not itself be false or fraudulent. It need only be intended to further or be a

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natural consequence of carrying out the scheme to defraud.

The use of the mails must be established beyond a reasonable doubt as to each particular mailing charged. If you find that a document was deposited in the mails of the United States Postal Service for delivery by pouch or to another post office or postal center, as the government alleged was done with certain ATAP documents in this case, that is sufficient to establish the use

of the mails. Each separate use of the mails in furtherance of a scheme constitutes a separate offense.

It is not necessary that the proof establish with a certainty as to any mailing claimed in the indictment or by the United States. It is enough if you find the evidence shows the mailing alleged as part of the offense was on or about the dates alleged by showing beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged and with a document in approximately the amount shown.

Now, Ladies and Gentlemen, I want to discuss with you a bit more the ATAP mail fraud racketeering acts. If you will look at your verdict form you can see that Racketeering Acts three through 36 charge mail fraud in connection with the ATAP procurement. Specifically, the indictment charges that

defendants devised a scheme to defraud the United States Postal Service of the honest and faithful service of defendant

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Jackson and Gentile to defraud the Postal Service of its right to conduct its contracting business affairs free from bribery, deceit, fraud, misrepresentation and theft and to obtain money by false, fraudulent pretenses and representations. This same scheme is alleged in Counts Three through Five and those alleged mail frauds are listed here as individual racketeering acts.

You may find that the defendant committed the racketeering act that corresponds to the listed mailing only if you find that the proof as to a defendant shows beyond a reasonable doubt that a scheme existed, that the defendant was a willful and knowing participant in the scheme and that the

mailing listed on Government Exhibit 418 was used to further the scheme and that such use of the mails was known to follow in the ordinary course of business or was reasonably foreseeable.

As to Racketeering Act 37, the indictment charges defendant Perholtz and defendant Jackson with mail fraud in connection with the Small Business Administration procurement by devising a scheme to defraud the SBA of its lawful right to conduct its business and affairs free from kickbacks, deceit, fraud, misrepresentation, theft and breaches and omissions of fiduciary and contract duties and to obtain money by false and fraudulent pretenses and representations. This same scheme is alleged in Counts Six through 15 and any one of those alleged mail frauds may, as I've already indicated,

be the basis for finding the Racketeering Acts.

The indictment does not charge that the purpose of the alleged scheme was to defraud IBS and if you find that the proof shows only a scheme to defraud IBS you should find the defendant not guilty. What the indictment does charge, however, is that there was a scheme to defraud the SBA by means of, among other things, breaches and omissions of fiduciary duty and contract duties owed to IBS which, in turn, were intended ultimately to defraud the SBA.

If you find, given all the facts and circumstances of the case as you determine them to be, that the proof shows beyond a reasonable doubt that such a scheme existed you may find that the scheme alleged in the indictment has been proved.

You may find that the defendant committed Racketeering Act 37 only if you find the proof as to each defendant shows beyond a reasonable doubt that such a scheme existed, that the defendant was a willful and knowing participant in the scheme and that any one of the mailings listed in Government's Exhibits 428A, 428B and 428C were used to further the scheme and that such use of the mails was known to follow in the ordinary course of business or reasonably foreseeable.

Different schemes are alleged in these charges of mail fraud and you must consider the proof as to each scheme, each alleged mailing and each defendant separately in

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determining whether the scheme existed, whether the alleged mailing occurred in

furtherance of the scheme and whether the particular defendant was a participant.

Now, if you'll turn to Page Three you'll see that's headed Forfeiture Under RICO. You need not consider forfeiture and shouldn't, unless you have found Perholtz or Jackson or both guilty of the RICO defense. Otherwise, you should disregard this section. On the other hand, the fact that you may have found defendants Perholtz or Jackson guilty of RICO does not determine whether or not the Government was met its burden of proof regarding various matters sought to be forfeited.

Forfeiture requires your separate consideration and requires that the Government prove beyond a reasonable doubt facts that are separate from those considered under RICO.

This section of the verdict form contains a list of income, bank

accounts, and property about which you've heard testimony and seen exhibits. The RICO Statute provides that a defendant who is found guilty of RICO shall forfeit to the United States any interest he has acquired in committing the offense and interest in, security of, claim against or property or contractual right of any kind affording a source of influence over the enterprise with which he was associated in committing the RICO offense.

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Therefore, there are two different ways in which property of a defendant found guilty of the RICO offense may be subjected to forfeiture.

First, if the evidence shows beyond a reasonable doubt that the property is owned by the defendant and that the property directly or indirectly represents proceeds derived from the

defendant's racketeering activities it is subject to forfeiture.

Second, if the evidence shows beyond a reasonable doubt that the property was owned by the defendant and that the property is an interest, security, claim or other contractual or property right that the defendant used to afford a source of influence over the enterprise described in the RICO offense it is subject to forfeiture. The purpose of this second basis for forfeiture is to subject to forfeiture assets which facilitate the conduct of an enterprise through a pattern of racketeering activity. For example, if the enterprise was a business in which the defendant had a 60 percent ownership interest and the defendant conducted the affairs of the business by means of a pattern of racketeering activity in violation of RICO then the defendant's 60 percent

ownership interest would be forfeitable if it afforded him a source of influence over the enterprise.

If you find defendant Perholtz guilty of RICO you must consider Paragraphs One and Two that are listed in the

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forfeiture section of the verdict form. Otherwise you should disregard them

Paragraph One lists certain contractual rights and partnership interests in a boat, the Mistress, that are allegedly owned by defendant Perholtz. The United States seeks forfeiture of these assets on both bases of forfeiture, that is, that they are proceeds derived from the alleged racketeering activity, or alternatively, they were used to afford a source of influence over the alleged enterprise. If you find unanimously, beyond a

reasonable doubt, that the particular is defendant Perholtz's property and that it is proceeds derived from racketeering activity charged in the RICO offense or that it was used to afford defendant Perholtz a source of influence over the enterprise you may check yes, indicating that it is subject to forfeiture. Otherwise, you must check no.

Paragraph Two lists certain securities, realty, contracts, licenses, bank accounts, and an accounting certificate that are allegedly owned by defendant Perholtz. The United States seeks forfeiture of these assets on only one basis of forfeiture, that they were used to afford a source of influence over the alleged enterprise. If you find unanimously, beyond a reasonable doubt, that the particular asset is defendant Perholtz's property and that it was used

to afford him a source of influence over the enterprise you

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may check yes, indicating that it's subject to forfeiture. Otherwise, you must check no.

You need consider Paragraph Three only if you find defendant Jackson guilty of RICO. Otherwise, you may disregard it. Paragraph Three concerns a partnership interest in a condominium allegedly owned by defendant Jackson. The United States seeks forfeiture of this asset on both bases of forfeiture. That is, that it is proceeds derived from the alleged racketeering activity, or alternatively, that it was used to afford a source of influence over the alleged enterprise. If you find unanimously, beyond a reasonable doubt, that the partnership interest is defendant Jackson's property and that it is the

proceeds derived from the RICO offense or was used to afford defendant Jackson a source of influence over the enterprise you may check yes, indicating it's subject to forfeiture. Otherwise, you must check no.

The burden is on the Government to establish the elements of forfeiture, each beyond a reasonable doubt, and this burden shifts to the defendant.

The next page of the verdict form after the two pages dealing with-- Page Five deals with the ATAP mail fraud. These counts charge only defendants Perholtz and Jackson with mail fraud. I've already instructed you on what is required to prove mail fraud and those instructions apply to these counts as well and I have written in here, Ladies

and Gentlemen, the pages where I've done that so that you can refer back if you need to do it.

As I've already mentioned in instructing you concerning RICO defendant Perholtz and defendant Jackson are charged with mail fraud in connection with the ATAP procurement by devising a scheme to defraud the United States Postal Service by bribery, deceit, fraud, misrepresentation and theft.

As I instructed you, to prove that a defendant is guilty of mail fraud the evidence must show beyond a reasonable doubt that the defendant knowingly and willfully devised or aided and abetted in a scheme or artifice to defraud or pay money by false pretenses and representations, United States mails were used in furtherance of a scheme to defraud, as specified in the indictment,

and that such use of the mails was reasonably foreseeable, or the defendant knew that the use of the mails would follow in the ordinary course of business.

Each of these three Mail Fraud Counts represents a separate alleged mailing caused in furtherance of the alleged scheme. Your verdict form shows the date on or about which the Government alleges the mailing took place and the amount alleged. You should consider each defendant and each court separately and determine, in accordance with these instructions I have given you, whether the evidence proves beyond a reasonable doubt that the defendant was guilty of mail fraud.

The counts we have discussed so far, the RICO offense,

and Counts Three through Five, only charge defendants Perholtz and Jackson. Defendants Root and Fletcher are not charged with these crime and you should be careful not to let the fact that they are being tried in the same trial influence your verdict.

As I told you at the beginning, each defendant is entitled to your separate consideration of the charges and the evidence as to him as if he were being tried alone.

Finally, Ladies and Gentlemen, I come to the SBA mail fraud. And the last few pages of your verdict form list Counts Six through 15. These counts charge all four defendants with mail fraud. All four defendants, Perholtz, Jackson, Fletcher and Root are charged with mail fraud in connection with the SBA-DCS procurement by devising a scheme

to defraud the SBA of its lawful right to conduct its business and affairs from kickbacks, deceit, fraud, misrepresentation, theft and breaches and omissions of fiduciary and contractual duty and to obtain money by false and fraudulent pretenses and misrepresentations.

Again, you should apply the instructions I've already give you as to what is required to prove mail fraud in considering your verdict on these counts.

Each of these mail fraud counts represents a separate mail fraud allegedly caused in furtherance of this scheme -- mailing allegedly cause in furtherance of this scheme. You

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should consider each defendant and each count separately and determine, in accordance with the instructions I have given you, whether the evidence proves

beyond a reasonable doubt that the alleged scheme existed, that the particular defendant under consideration was a knowing and willing participant in the scheme, the mails were used in furtherance of the scheme as specified and that the use of the mails was known to follow in the ordinary course or was reasonably foreseeable.

In connection with the alleged SBA mail fraud scheme the Government has used some terms which require some additional explanation in defining the alleged scheme. The indictment charges that the alleged scheme involved breaches of fiduciary duty and concealing those breaches.

Fiduciary duties arise when one has an employment, contractual or other relationship with another person, corporation or other entity which obligates him to act in good faith and in

the best interests of the person or entity to whom the duty is owed.

When one becomes an agent acting on behalf of a principal he has certain fiduciary duties. An agent is one who is authorized by another, who is called a principal, to act on his behalf. Two things are necessary to create an agent-principal relationship. There must be an understanding between the principal and the agent that, one, the agent undertakes to act on behalf of the principal to pursue the interests

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of the principal and primarily for the principal's benefit, and, two, the agent acts under the general supervision and subject to the direction of the principal.

It's not necessary that a principal actually give directions or have the power to supervise and control

the agent at every moment. One may be an agent even if the principal has agreed to give the agent discretion to act, as long as the principal has the power to give directions and the agent has indicated that he consents to follow the principal's directions. However, if it is understood that one is employed only to produce a certain result and is not subject to the supervision and direction of the other as to the means or methods of achieving the final result no principal-agent relationship exists.

The understanding creating an agent-principal relationship may be created by a formal contract but need not be. It may also be created by an informal agreement or a course of dealing. The name which the parties may give the relationship isn't determinative in determining whether an agent-principal relationship exists you

may consider any agreement, conduct or dealings between the alleged agent and the authorized officers of the alleged principal that may indicate that they intended, or did not intend, to enter into such a relationship.

Here, the Government contends that defendant Perholtz

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was an agent of IBS for the purpose of providing technical assistance in the design, identification, selection, procurement, purchase, installation and testing of the components of the SBA Data Communications System Network and that the alleged mail fraud scheme involved breaches of fiduciary duty in connection with his activities for IBS.

Similarly, in a corporation, officers and directors, as well as employees of the corporation, are said to serve as agents of the corporation and

thus have a fiduciary duty to the corporation. The Government contends that defendant Fletcher was the vice-president for operations of IBS and that the alleged SBA mail fraud scheme involved breaches of fiduciary duties he owed to IBS as an officer of the corporation

Employees of a corporation also have fiduciary duty with respect to their employer when acting on behalf of their employer or on matters which are the subject of their employment. The United States charges that the defendant Jackson was an employee of IBS where he served as project manager for IBS's contract with the Small Business Administration's DCS procurement and that the alleged scheme involved breaches of his fiduciary duty as an employee.

Now, what is a breach of fiduciary duty? An agent, officer or

employee must act in the best interest of his employer when acting on behalf of his employer or on matters

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which are the subject of his employment or agency. He breaches his fiduciary duty if he, without the knowledge of his employer or principal, takes action to the detriment of his employer or principal to advance his own interest or those of another.

Thus, an agent, officer or employee with a fiduciary duty must avoid and disclose any conflict of interest. A conflict of interest occurs where it becomes apparent that his personal interest, financial or otherwise, is or may be contrary to that of his principal or employer. One who has a fiduciary duty breaches that duty if he knowingly permits or induces his corporation, employer or principal to enter into a

business transaction with another corporation, partnership or individual in which he has a substantial interest or will derive personal benefit without fully disclosing the conflicting interest to his corporation, employer or principal. He must also inform his corporation, employer or principal of any material facts concerning the transaction, that is, he must disclose any fact that he knows would be important for his corporation, employer or principal in considering the transaction. An agent, officer or employee with a fiduciary duty breaches that duty if he approves or recommends a business transaction for his corporation, employer or principal without fully disclosing any conflicting interest.

The Government contends that the alleged SBA mail fraud scheme

involved concealing breaches of fiduciary duties

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by defendants Perholtz, Jackson and Fletcher in that it allegedly involved concealing alleged conflicts of interest involved in the SBA-DCS procurement and failing to disclose these conflicts of interest and material facts to IBS of the SBA.

I remind you that the indictment does not charge the purpose of the alleged scheme was to defraud IBS, and if you find the proof shows only a scheme to defraud IBS you should find the defendant not guilty. However, the indictment does charge that there was a scheme to defraud the SBA, as I have said, by means of, among other things, breaches and omissions of fiduciary duty and contractual duties owed to IBS, which, in turn, were intended ultimately

to defraud the SBA, and if you find that the proof shows beyond a reasonable doubt that such a scheme existed you may find the SBA mail fraud scheme alleged in the indictment has been proved.

The indictment also alleges that the SBA mail fraud scheme involved concealment of kickbacks. Under the procurement laws of the United States a kickback occurs when a subcontractor, with a specific intent to induce the award of a subcontract or to acknowledge the grant of any subcontract previously awarded from an prime contractor who has a negotiated contract with any agency of the United States, directly or indirectly, pays any fee, commission or compensation of any kind or grants any gift or gratuity of any kind to any officer, employee or agent of the prime contractor. Such kickback

payments are prohibited by law.

The term "subcontractor" means any person or corporation that holds an agreement to perform all or any part of the work or to make or further any article or service required for the performance of a negotiated contract or a subcontract entered into under a negotiated contract. A "negotiated contract" means a government contract made without formal advertising.

The United States contends that part of the alleged mail fraud scheme was to conceal payments by subcontractors directly or indirectly to defendants Perholtz, Jackson and Fletcher as inducements for the award of subcontracts or as an acknowledgment of subcontracts previously awarded and that these payments were illegal kickbacks because these defendants were agents, employees

or officers of the prime contractor on the SBA-IBS contract.

In considering these allegations and determining whether the alleged scheme existed and whether any defendant was a knowing or willful participant you must be guided by the definitions I have given you in these instructions.

Of course, in addition to proving the scheme alleged the evidence must prove the other elements of mail fraud, as I've instructed you, that the defendant was a knowing participant in the scheme, that the mails were used to further the scheme, and that the use of the mails was reasonably

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foreseeable or known to follow in the ordinary course.

Finally, several points have to be brought to your attention in view of

the discussion and the oral argument with regard to evidence that's been presented on the condominium allegedly owned by Fletcher and Jackson.

First, there's no requirement that a partnership agreement, such as the Southern Properties Partnership Agreement, be filed as a public document.

Second, that Fletcher and Jackson owned the condominium in a partnership, there's no requirement that both individuals place their names on the deed of the property. There's also no requirement that partners investing in property such as the condominium in question file a partnership income tax return and each partner must report income from the investment on his personal income tax.

In addition, it is permissible for owners of investment property to make

two visits per year for the purpose of inspecting and maintaining this property and deduct the ordinary and necessary expenses incurred in inspecting and maintaining on their income tax returns.

Finally, one aspect of this matter involves the form used for disclosing employment and financial interest of federal employees. You are advised that postal employees are required to furnish the information requested on the form and that it is used by appropriate officials, both inside and outside the Postal Service, to investigate conflicts of

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interest and violations of federal law.

Now, in conclusion, Ladies and Gentlemen, that completes my discussion of the verdict form. You should understand that the question of possible punishment of the defendants in the event

of conviction is no concern of the jury. And it should not enter into or influence your deliberations in any way. The duty of imposing sentence in the event of conviction rests exclusively upon the court and the court has wide latitude in such matters. You should weigh the evidence in the case and determine the guilt or innocence of the defendant solely on the basis of the evidence without any consideration of the matter of punishment. You are to decide without sympathy, bias or prejudice to any party. You're to decide this case based entirely on the evidence you've heard and the instructions that I have just given you.

Upon retiring to the jury room you should select from among your number a foreperson. The foreperson will preside over your deliberations, will be your representative or spokesman before

the court in the event there's any matter which you wish to communicate with the court about.

The verdict must represent the considered judgment of each juror. In order to return a verdict on any aspect of this case it is necessary that each juror agree to the verdict. Your verdict must be unanimous. When you reach a verdict your foreperson will fill out the verdict form, in accordance

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with these instructions, and as the form requires, and the verdict form will be returned to the court by the jury as a whole.

You'll take, of course, the verdict form to the jury room and when you've reached unanimous agreement as to your verdict you will have your foreperson fill it out, date and sign the form which states the verdict which you

unanimously agree to as to each defendant and then it is returned here in the courtroom.

The exhibits that have been received in evidence are going to be sent -- available to you. They'll be sent to the jury room to aid your deliberations. And a copy of these instructions, as I've said, will also be sent to you. The exhibits include redacted forms of all these big charts so you won't have to worry about the big charts. You will have them on lettersized paper that you can pass around and look at the charts without having to manage the large representation that was here, in the jury room.

There will be a Marshal outside your door. If it becomes necessary during your deliberations to communicate with the court you may send a note by the Marshal outside the door, signed by your

foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with the court by any means other than a signed, written document in that fashion. And the court, of course,

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will never communicate with any members of the jury on any subject touching on the merits of this case unless it's in writing or in open court here.

You should bear in mind that you're never to reveal to any person, not even the court, how the jury vote stands numerically or otherwise on the question of guilt or innocence of any defendant prior to the time that your foreperson submits the verdict form.

I'm going to say it another way. Do not, do not under any circumstances ever send me a note that says so many jurors feel this way or so

many jurors feel that way on anything. Don't do it.

Now, I've been taking into account a couple of other problems. You've got smokers and non-smokers. That seems to happen everywhere these days. The jury room is rather confining. And if there is an objection by any juror to smoking in the jury room I want to make this suggestion to you and that is, that you remember that we took a three o'clock break and we took an eleven o'clock break sort of, about ten minutes, and the smokers and non-smokers separate and there's no reason you cannot continue to do that if you wish provided that when you break into two parts for the recess you don't talk about the case. Talk about whether Theisman is going to sign a contract or whether it's going to rain Sunday, but don't talk about the case because all of your conversations

about the case must be only when you're all together so all of you always have the benefit of each others' views and you have a mutual deliberation. And if your foreperson sees that that is done I think there will be no objection to your doing it.

Now, we are closely approaching the lunchtime. When you retire you should select, of course, as I've said, a foreperson before you commence your deliberations and about twelve o'clock if you're prepared to go to lunch just knock on the door and the Marshal will take you to lunch.

Now, this has been a long case compared to some cases tried in this court and you realize from these instructions and the nature of the verdict form you've got a lot of decisions to make. And I want you to

understand now that you're not going to be held here all night until you decide it. Sometimes jurors think that that's what's going to happen. You're going to go at this at whatever speed and in whatever manner you feel best to do it. And what I plan to do today, for example, if I have not received a verdict before then is to call you in a five o'clock and let you go for the day. And similarly, if you need additional time we're not going to put you in a position where you're deliberating more than the normal jury hours that you've been here before. And you should take such time as you feel necessary, short or long, depending on your view of the evidence and what you need to consider

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among yourselves.

Now, I must at this time excuse the alternate jurors. You know, we've

had a surprisingly healthy jury. There were moments there when I saw a few people, particularly in the front row, that had quite a heavy cold and I wasn't sure they were going to make it and apparently the food is better than it sometimes is, nobody got sick downstairs. You should understand we have to have a verdict of twelve people and all of this effort that the lawyers have put into this case and such effort as the court has put into the case would have been wasted if we ran out of twelve people and that is why we have alternates and, as you know, we lost two, and under a case this length there was no way of my knowing what unexpected things might happen in peoples' families, health and so forth, that would need replacement by the use of the alternates. I want to thank each of you for your service. I hope you have found it an interesting

experience and I'm sure with the friendships and contacts you've made you'll find out ultimately what the verdict is.

I'm going to excuse all three of you now. Do not under any circumstances talk to anybody connected in this case in any way about the deliberations or your own views. Keep your own conscience because the rest of the jury is deliberating and you wouldn't want to interfere with that.

You probably ought to all check in upstairs now

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with the jury lounge and to tell them where to mail the check and that you're done. And if you have anything in the jury room the three of you may go get it now.

I want to thank you again for

your public service, all three of you. We appreciate your patience.

(Alternates Dismissed)

THE COURT: It will take a few minutes, Ladies and Gentlemen, to collect all these exhibits and other papers that are coming in to you. I imagine by the time you take the seventh inning stretch and select a foreperson you'll be about ready to go to lunch and you can come back and get going in your deliberations.

Have they gone now, Mr. Marshal? Let me know when they leave.

You may now retire, Ladies and Gentlemen, select a foreperson and proceeding accordingly.

(Whereupon, the jury was dismissed at 11:40 a.m. to commence their deliberations.)

* * * *

Supreme Court, U.S.
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Nos. 87-1946 and 87-7011

In the Supreme Court of the United States

OCTOBER TERM, 1988

RONALD J. PERHOLTZ, PETITIONER

v.

UNITED STATES OF AMERICA

FRANKLIN W. JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the jury instructions permitted petitioners to be convicted for conduct that, under *McNally* v. *United States,* No. 86-234 (June 24, 1987), does not violate the federal mail fraud statute.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals affirming petitioners' convictions (Pet. App. A1-A51)[1] is reported at 842 F.2d 343. The opinion of the court of appeals denying petitioners' motions for release pending appeal (Pet. App. B1-B15) is reported at 836 F.2d 554.

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[1] "Pet. App." refers to the appendix to the petition in No. 87-1946.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1988. The petitions for a writ of certiorari were filed on May 9, 1988, and are therefore out of time under Rules 20.1 and 29.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Columbia, petitioners each were convicted on one count of racketeering, in violation of 18 U.S.C. 1962(c), and 13 counts of mail fraud, in violation of 18 U.S.C. 1341. Perholtz was sentenced to a total of ten years' imprisonment[2] and was ordered to forfeit more than $700,000. Jackson was sentenced to a total of seven years' imprisonment[3] and was ordered to forfeit a condominium.

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[2] Perholtz was sentenced to ten years' imprisonment on the racketeering count. He was sentenced to five years' imprisonment on three mail fraud counts that related to defrauding the Postal Service. Those sentences were ordered to be served concurrently with each other and with the sentence on the racketeering count. He was sentenced to five years' imprisonment on the other ten mail fraud counts, which related to defrauding the Small Business Administration. Those sentences were ordered to be served concurrently with each other and with the sentence on the racketeering count, and consecutively to the sentences on the other mail fraud counts.

[3] Jackson was sentenced to seven years' imprisonment on the racketeering count. He was sentenced to two years' imprisonment on the three mail fraud counts relating to defrauding the Postal Service. Those sentences were ordered to be served concurrently with each other and with the sentences on the racketeering count. He was sentenced to five years' imprisonment on the ten mail fraud counts that related to defrauding the Small Business Administration. Those sentences were ordered to be served concurrently with each other and

1. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. A3-A15). It showed that petitioners devised a scheme to defraud the United States Postal Service in connection with the development of a computerized payroll system, and that they devised another scheme to defraud the Small Business Administration (SBA) in connection with the development of a data communications system.

Petitioner Perholtz was General Manager for Accounting for the Postal Service until December 1977, when he resigned and formed his own computer systems development firm. Petitioner Jackson was the manager of the Postal Service's Systems Redesign Branch, which directed the Postal Service's development of a computerized payroll system. In early 1978, Perholtz suggested to Jackson and John Gentile, the Assistant Postmaster General for Finance, that they "wire" the contract to develop a part of the Postal Service's computerized payroll system called the Automated Time and Attendance Procedures (ATAP) project. Perholtz then entered into an agreement with Essex Engineering under which he would prepare the software for Essex's bid on the ATAP contract. Jackson arranged for a short response time to the Postal Service's request for proposals, and Gentile informed Perholtz in advance of the project's technical requirements. As a result, Essex's response to the request for proposals closely matched the request's specifications, and Essex was the only vendor to provide a demonstration of software as well as hardware. Although the Postal Service had stated that it would not award the contract based on the request for proposals, Jackson prepared a report after the proposals were submitted stating that it was necessary to proceed with the ATAP project quickly. Gentile then

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with the sentence on the racketeering count, and consecutively to the sentence on the other mail fraud counts.

recommended a noncompetitive award to Essex, and the Postal Service awarded the project to Essex on that basis in March 1979. Perholtz received nearly $200,000 as a result of the scheme. Pet. App. A3-A6.

In May 1979, Jackson left the Postal Service and joined International Business Services, Inc. (IBS), which had a contract to develop a data communications system for the SBA. Jackson became the project manager for the SBA contract and IBS retained Perholtz as a consultant. Perholtz arranged for IBS to award a subcontract under the SBA project to a company that agreed to pay unearned commissions, which were split by Jackson and Gentile for their part in the ATAP scheme. Each of them ultimately received $27,000. Perholtz subsequently arranged for the award of three other subcontracts on the SBA project to companies that agreed to pay kickbacks to him, and he received more than $500,000 through those arrangements. Pet. App. A6-A11. The cost of the kickbacks was paid by IBS, which passed it on to the SBA under its cost-plus contract (*id.* at B10).

2. The mail fraud counts in the indictment alleged schemes to defraud the Postal Service and the SBA of honest procurement processes, to defraud the Postal Service of the honest and faithful services of Jackson and Gentile, and to obtain money by false pretenses and representations (Indictment 41-42, 44). After petitioners were convicted, this Court held in *McNally* v. *United States,* No. 86-234 (Jan. 24, 1987), that the mail fraud statute, 18 U.S.C. 1341, is limited to the protection of property rights and does not protect the intangible right of the citizenry to good government. On appeal, petitioners argued that, in light of *McNally,* their convictions should be reversed.[4]

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[4] If all the mail fraud convictions were reversed, then the racketeering convictions, which rested on only one predicate act other than mail fraud, would also have to be reversed (Pet. App. B6).

The court of appeals rejected petitioners' contention. The court first concluded (Pet. App. A44) that *McNally* did not require reversal of the convictions on the counts relating to the SBA scheme. The court explained that petitioners' "elaborate kickback scheme" deprived the SBA of property, since it "ensured that the 'negotiated' cost of the subcontracts was higher than the price at which the subcontractors would have been willing to contract, and ensured that this higher cost was passed through to the SBA in its cost-plus contract with the prime contractor" (*id.* at B9-B10).[5] While the jury instructions contained intangible rights language, the court concluded that, read as a whole and in conjunction with the description of the scheme in the indictment, the instructions permitted the jury to return guilty verdicts only if it found that petitioners defrauded the SBA of money through the kickback scheme (*id.* at B11).

The court of appeals also concluded (Pet. App. A44-A46) that *McNally* did not require reversal of the convictions on the ATAP counts. Relying on *Carpenter* v. *United States,* No. 86-422 (Nov. 16, 1987), the court explained (Pet. App. A45) that the "theft of property consisted of [Jackson's] appropriation of confidential information belonging to his employer"—to wit, the design specifications that the Postal Service would require for the ATAP project. The court stated that "[b]y appropriating the confidential information concerning the ATAP specifications and leaking it to Perholtz, Jackson skewed the bidding process and directly impinged upon the

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[5] The court's rationale for finding that *McNally* did not require reversal of petitioners' convictions on the SBA counts is contained in its opinion rejecting their motions for release pending appeal (Pet. App. B7-B12). The court explicitly relied on that opinion in its opinion affirming petitioners' convictions (*id.* at A44).

government's economic interests" (*ibid.*). Although the court acknowledged that "this case was not presented to the jury under *Carpenter*'s theft of confidential business information rationale," the court nonetheless concluded that "the factual predicate for the jury's verdict necessarily implies that it found that Jackson stole confidential information in violation of the mail fraud statute as interpreted in *Carpenter*" (Pet. App. A46).

ARGUMENT

Petitioners renew their contention that their convictions must be vacated in light of *McNally*. Essentially, they make two claims. First, they argue that the evidence at trial did not show that either the Postal Service or the SBA suffered any property loss as a result of their fraudulent schemes. In addition, they argue that the jury instructions were insufficient to support their convictions.

1. *McNally* involved a scheme in which the defendants, who controlled the selection of Kentucky's workers' compensation insurer, selected an agency that agreed to pay to the defendants a portion of the commissions it received from underwriting insurance companies. The defendants were charged and convicted of mail fraud on the theory that their scheme had deprived the citizens of Kentucky of their intangible right to honest government. Holding that the mail fraud statute is "limited in scope to the protection of property rights" (slip op. 10), this Court reversed. The Court explained that "there was no charge and the jury was not required to find that the Commonwealth itself was defrauded of any money or property" (*ibid.*). In fact, on the record in that case it seemed plain that Kentucky did not lose money because it appeared that nothing the defendants did affected the amount the Commonwealth paid for insurance or the amount the agency received as commissions, as the court

below recognized (Pet. App. B9). Rather, as the Court explained in *McNally*, "the premium for insurance would have been paid to some agency" and, hence, the commissions that the defendants shared "were not the Commonwealth's money" (slip op. 10). All that Kentucky lost, the Court noted in *Carpenter,* was the defendants' "honest and faithful service, an interest too ethereal in itself to fall within the protection of the mail fraud statute" (slip op. 6).

In this case, the court of appeals correctly concluded that the evidence showed that both the SBA and the Postal Service were deprived of property within the meaning of *McNally*. The SBA scheme was a typical kickback scheme through which petitioners received unearned commissions from the SBA's subcontractors. As the court of appeals explained, the result of the scheme was that the SBA paid more to IBS than it otherwise would have paid, since the cost of the kickbacks "was passed through to the SBA in its cost-plus contract with the prime contractor" (Pet. App. B10). Thus, the SBA scheme was quite different from the scheme in *McNally* because the SBA, unlike Kentucky, plainly lost money as a direct result of the scheme. Other courts of appeals have likewise concluded that normal kickback schemes involve property loss within the meaning of *McNally* by inflating the victim's costs. *United States* v. *Piccolo,* 835 F.2d 517 (3d Cir. 1987), cert. denied, No. 87-1465 (May 31, 1988); *United States* v. *Richerson,* 833 F.2d 1147 (5th Cir. 1987); *United States* v. *Fagan,* 821 F.2d 1002 (5th Cir. 1987), cert. denied, No. 87-589 (Jan. 11, 1988).

In concluding that the ATAP scheme caused a loss of property to the Postal Service, the court of appeals correctly relied on *Carpenter*. In that case, this Court upheld the convictions for mail and wire fraud of a Wall Street

Journal reporter and others who traded stock in anticipation of the content of the Journal's "Heard on the Street" column, a well-known feature that often had an effect on the market price of the stocks discussed there (slip op. 3). The Court concluded that the Journal had a property interest in the content and timing of its column (*id.* at 6) and, because the reporter obtained the information in the course of his employment, he was bound not to use it in a manner not authorized by the Journal (*id.* at 8).

Here, Jackson had confidential information concerning the design specifications that the Postal Service would require for the ATAP project that he acquired in the course of his employment. Like the defendants in *Carpenter,* Jackson appropriated the information for his own personal benefit. Under *Carpenter,* the appropriation of confidential information belonging to one's employer plainly falls within the scope of the mail fraud statute, whether or not the employer lost money (slip op. 7). Moreover, as the court of appeals observed (Pet. App. A45), by appropriating the confidential information concerning the ATAP specifications, petitioners clearly impinged on the Postal Service's economic interests in that they skewed the operation of the competitive bidding process, a process that depends on the receipt by all bidders of the same information at the same time.[6]

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[6] Jackson argues (87-7011 Pet. 15) that, under the decision of the court below, "any circumvention of government contracting procedures would involve a deprivation of intangible property." That is simply not so, since not all cases involving a circumvention of government contracting procedures involve the appropriation and leaking of confidential business information. The court of appeals in this case explicitly refrained from holding that "a government employee's unauthorized use of confidential information always would constitute a mail fraud violation" (Pet. App. A45).

2. Nor were the jury instructions insufficient to support petitioners' mail fraud convictions. Petitioners did not request a "property loss" instruction or object to the charge on the ground that it did not contain such an instruction. Accordingly, their claim must be reviewed under the plain error standard of Fed. R. Crim. P. 52(b). *Piccolo,* 835 F.2d at 519; *Richerson,* 833 F.2d at 1157 & n.26. As this Court has observed, under the plain error doctrine an error does not justify reversal unless it "undermine[s] the fundamental fairness of the trial and contribute[s] to a miscarriage of justice." *United States* v. *Young,* 470 U.S. 1, 16 (1985).

The jury instructions relating to the SBA scheme, while containing some language regarding intangible rights, required the jury to find that the SBA lost money. The district court explicitly defined a "fraudulent scheme" as a plan "to obtain money or property" by false pretenses or representations (Pet. App. C74). In addressing the SBA scheme specifically, the court described it as one "to defraud the SBA of its lawful right to conduct its business and affairs free from kickbacks, deceit, fraud, misrepresentation, theft and breaches and omissions of fiduciary and contract duties and to obtain money by false and fraudulent pretenses and representations" (*id.* at C83, C95-C96). The court never separated the objectives of the scheme in its charge or told the jury it could convict on one theory alone. Furthermore, the district court made clear that, in order to convict, the jury would have to find that petitioners participated in "a scheme substantially the same as the one alleged in the indictment" (*id.* at C78). As the court of appeals found (*id.* at B11), the SBA scheme charged in the indictment was "a kickback scheme causing tangible loss to the SBA" (see Indictment 14-20, 72-81). See *Piccolo,* 835 F.2d at 520 (upholding mail fraud conviction under *McNally* where jury instructions defined

scheme as one to defraud victim both of the intangible right to the honest services of its employee *and* of money); cf. *United States* v. *Horton,* 847 F.2d 313 (6th Cir. 1988) (upholding mail fraud convictions under *McNally* where indictment charged that scheme deprived victim of intangible rights and of money); *United States* v. *Wellman,* 830 F.2d 1453, 1463 (7th Cir. 1987) (same).

Although the ATAP scheme was not presented to the jury under the *Carpenter* rationale of theft of confidential business information, the court of appeals correctly concluded (Pet. App. A40) that the jury instructions permitted it to affirm on that basis. The ATAP counts in the indictment alleged a bid-rigging scheme involving the circumvention and manipulation of the Postal Service's procurement processes (Indictment 8-14, 55-58, 68-72), and the jury instructions required the jury, in order to convict, to find that petitioners engaged in the scheme that was alleged in the indictment (Pet. App. C78). Furthermore, the district court's instructions specifically required the jury to find an enterprise whose purpose was to enrich itself unjustly "from the proceeds of government contracts and subcontracts for computer services and equipment which had been and would be obtained by means of bribery, fraud and circumvention of government contracting procedures" (*id.* at C50). Thus, as the court of appeals concluded, "the factual predicate for the jury's verdict necessarily implies that it found that Jackson stole confidential information in violation of the mail fraud statute as interpreted in *Carpenter*" (*id.* at A46).

Jackson argues (87-7011 Pet. 9) that the decision below is inconsistent with cases involving other statutes (not decided under the plain error standard) in which courts have refused to apply harmless error analysis to jury instructions that omit an essential element of the crime. In *Pope* v. *Illinois,* No. 85-1973 (May 4, 1987), however, this

Court specifically held that harmless error analysis applies to instructional errors relating to the elements of the offense. Moreover, in none of the cases that Jackson cites did the court suggest that such an omission would require reversal where, in light of the instructions that were given, the verdict demonstrated that the jury necessarily found the element concerning which it was not specifically instructed. Cf. *Rose* v. *Clark*, 478 U.S. 570, 580-581 (1986) (presumption of malice instruction in murder prosecution would be harmless error if the predicate facts that the jury found necessarily showed that the defendant intended to kill); *United States* v. *Jacobs*, 475 F.2d 270, 283 (2d Cir.) (upholding conviction on the ground that, if the jury found conspiracy under an erroneous theory, it necessarily found every element necessary to convict under the correct theory), cert. denied, 414 U.S. 821 (1973).[7]

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[7] Jackson also contends (87-7011 Pet. 12-14) that the prosecutor committed reversible error when he mentioned during the rebuttal portion of his closing argument that a civil statute, 41 U.S.C. 51, since amended, created a conclusive presumption that the cost of kickbacks received by government employees is borne by the government (Tr. 7036-7037). In its opinion denying petitioners' motion for release pending appeal, the court below determined that if the comment was erroneous any error was harmless—indeed, that it did not even "raise a close question" (Pet. App. B14). As the court explained, to convict on the SBA counts the jury necessarily found that the defendants obtained kickbacks and, under the facts of this case, it necessarily followed that the SBA lost money. That essentially factual determination was correct and does not warrant this Court's review.

Jackson also errs in relying on this Court's decision in *Rose* v. *Clark*, *supra*, in connection with his argument that reversal is warranted because the jury was told by the prosecutor to presume that the SBA bore the cost of the kickbacks. In that case, the Court held that the trial judge erred in instructing the jury in a murder case that malice could be presumed. The Court remanded for a determination whether the error was harmless, recognizing that the error did not affect the jury's verdict if the predicate facts found by the jury necessarily led to

Taking a different tack, Perholtz acknowledges (87-1946 Pet. 12) that the jury "was instructed as to a monetary deprivation," but argues (*id.* at 13-14) that the jury instructions were flawed because they also contained intangible rights language. But the whole point of the court of appeals' decision was that the jury could not have concluded that petitioners engaged in the fraudulent scheme alleged in the indictment without finding both a deprivation of intangible rights *and* a deprivation of property rights; the two were so interrelated that one necessarily implied the other. Indeed, the district court did not even separate the two theories in its instructions or tell the jury that it could convict on the basis of one without the other. In these circumstances—where despite the intangible rights language in the instructions it is clear that the jury found a property deprivation—the inclusion of intangible rights language does not constitute plain error. See *Piccolo,* 835 F.2d at 520; *Richerson,* 833 F.2d at 1157-1158.

Perholtz contends that review is warranted because "[t]he reactions of the Courts of Appeals to *McNally* have varied" (87-1946 Pet. 10). As he states, a number of courts of appeals have affirmed mail fraud convictions even though the jury instructions contained intangible rights language, while other courts of appeals have reversed convictions obtained prior to *McNally*. Contrary to Perholtz's contention, however, there is no conflict among the circuits on this issue. To determine whether a conviction should be overturned in cases in which the jury instructions did not anticipate the *McNally* decision, a court must review the evidence at trial and the jury instructions that

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a finding of malice (478 U.S. at 580-581). Accordingly, *Rose* v. *Clark, supra,* supports the approach of the court below in finding that any error in the prosecutor's remarks did not affect petitioners' substantial rights because the predicate facts found by the jury showed that the SBA lost money.

were given. Where no objection has been lodged, the court must further determine whether any error in the instructions satisfies the plain error standard. Where, as here, it is clear that the jury must have concluded that the victim of the fraudulent scheme was deprived of a property interest, then the convictions should be affirmed. While in some cases courts have not been able to conclude that the jury found that the victim was deprived of a property interest and have reversed mail fraud convictions obtained prior to *McNally*, the differing outcomes of different cases do not reflect a difference in the legal principles being applied, but rather differences among the instructions given and the particular facts of each case. Moreover, the issue raised in this case—the adequacy of instructions given in pre-*McNally* trials—is not one of continuing importance. *McNally* was decided more than a year ago, and it is unlikely that there will be many more cases that were tried on an intangible rights theory that have yet to come before the courts of appeals. For that reason as well, review by this Court is not warranted.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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